United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-6151

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

NO. 76-6151

CHARLES R. HARARY,

Plaintiff-Appellant

versus

WILLIAM E. SIMON, Secretary of the Treasury of the United States of America,

Defendant-Appellee.

UNITED STATES COURT OF APPEALS
FILED
DEC 8 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Appeal from the United States District Court for the Southern District of New York

APPENDIX FOR PLAINTIFF-APPELLANT

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Docket Entries (70 CR 1104)

12-23-70	Filed indictment.
1- 4-71	CHARLES R. HARARY - Pleads Not guilty. Bail fixed at $25,000 unsecured PRB. Paroled until 4pm today to give bail. Bail limits to include Eastern District of N.Y. MEYER SUTTON - Pleads Not Guilty. Bail cont'd ($25,000 PRB). ABRAHAM SUTTON - Pleads Not Guilty. Bail cont'd ($25,000 PRB) Motion date to be fixed by Judge Metzner, MOTLEY, J.
1- 4-71	CHARLES HARARY - Filed notice of appearance Michael S. Fawer, 19 E. 70 Th. St., N.Y.C. 10021 (734-5930)
1- 4-71	MEYER SUTTON & ABRAHAM SUTTON - Entered and filed Order for extension of their bail limits. METZNER, J.

Docket Entries

1- 5-71	CHARLES R. HARARY - Filed Unsecured P.R.B. dtd. 1-5-71 amt. $25,000.
3-17-71	All Deft's - Filed affidavit and notice of motion for an order suppressing all statements and evidence obtained fro them by I.R.S. and defendants' joint memorandum of law. (METZNER, J.)
3-24-71	Filed Affidavit of Harold R. Wenig in opposition to defts' motions for suppression of evidence and other relief. METZNER, J.
3-24-71	Filed Memorandum of Law for the U.S. in opposition to Defts' Motion to suppress. METZNER, J.
4-23-71	Filed copy of opinion # 37571 by Metzner, J. - Motion denied. Trial will proceed on May 17, 1971 in Rm. 705 at 10:30 A.M. briefs and requests to charge are to be submitted on May 12, 1971. METZNER, J.
3-26-71	ALL DEFTS (attys present) arguments on motions heard and DENIED. Briefs to be submitted on or before April 5, 1971. Trial set for May 17, 1971. METZNER, J.
5-17-71	Deft's Meyer Sutton & Abraham Sutton make application to sever. Goot moves for severance of M. & A. Sutton - Granted. Jury trial begun as to deft. Charles R. Harary and continues before METZNER, J.
5-19-71	Trial cont'd.
6- 2-71	Trial cont'd.
5-20-71	Trial cont'd.
5-21-71	Trial cont'd. and concluded. Jury disagree-

Docket Entries

	ment. Retrial Aug 9, 1971. METZNER, J.
5-21-71	Filed copy of opinion # 37667 by Metzner, J., "Accordingly, this motion for a severance denied with leave to renew at the close of the evidence." so ordered (mailed notice) (see copy in file) METZNER, J.
6- 1-71	SECOND TRIAL Deft. HARARY (atty present. Jury trial begun before Metzner, J.
6-2-71	Trial cont'd.
6- 3-71	Trial cont'd.
6- 4-71	Trial cont'd & concluded. Jury verdict - Not guilty - cts. 1 & 2. Guilty ct. 3 on Presentence investigation ordered. Sentence adj'd to 8-17-71. Bail contd. METZNER, J.
6-10-71	Filed notice of motion and affidavit for judgment of acquittal. METZNER, J.
6-18-71	CHARLES R. HARARY - Filed deft's memorandum of law in support of motion to set aside verdict and enter judgment of acquittal. METZNER, J.
7-16-71	CHARLES HARARY - Filed Govt'd memo of law. METZNER, J.
7-21-71	CHARLES HARARY - Filed memo - endorsed on motion dated June 10, 1971., "This motion is denied. The substance of the motion has been argued several times in extenso and each time denied." (mailed notice) METZNER, J. ..
7-23-71	Filed Order permitting deft. Meyer Sutton to travel as indicated COOPER, J.

Docket Entries

7-26-71 MEYER SUTTON — Filed Unsecured Personal Recognizance Bond in the sum of $25,-000.00. Signed and acknowledged before John Livingston, Clerk. By: E. APONTE, DEPUTY CLERK

8-17-71 Harary — Filed Judgment (atty present) It is adjudged that the defendant is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of ONE (1) YEAR on count 3.

Defendant is continued on his present bail to post bail pending appeal fixed at $25,-000.00 personal recognizance bond. METZNER, J.

Issued commitment and copies.

Aug. 23 1971 Filed Transcript of record of proceedings, dated 5-13-71

Aug. 32 1971 Filed Transcript of record of proceedings, dated 5-25-71.

Aug. 23 1971 Filed Transcript of record of proceedings, dated 6-1-71

Aug. 23 1971 Filed Transcript of record of proceedings, dated 6-3-4-71

Aug 23, 1971 Filed Transcript of record of proceedings, dated 6-1-71

Aug. 23 1971 Filed Transcript of record of proceedings, dated 6-2-71

Aug. 23 1971 Filed Transcript of record of proceedings, dated 6-2-71

Aug. 23 1971 Filed Transcript of record of proceed-

ings, dated 6-3-71

Aug. 23 1971 Filed Transcript of record of proceedings, dated 6-3-71

Aug. 23 1971 Filed Transcript of record of proceedings, dated 5-17-71

Aug. 23 1971 Filed Transcript of record of proceedings, dated 5-18-71

Aug. 23 1971 Filed Transcript of record of proceedings, dated 5-18-71

Aug. 23 1971 Filed Transcript of record of proceedings, dated 5-19-71

Aug. 23 1971 Filed Transcript of record of proceedings, dated 5-21-71

Indictment

UNITED STATES COURT OF APPEALS

For The Second Circuit

70 Cr. 1104

[Same Title]

The Grand Jury charges:

1. From on or about the 1st day of September 1970 up to and including the 22nd day of September, 1970, in the Southern District of New York, CHARLES R. HARARY, MEYER SUTTON and ABRAHAM SUTTON, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree with each other to commit offenses against the United States, to wit, to violate Title 18, United States Code, Sections 201(b) and 201(f) and to defraud the United States in the exercise of its Governmental function of administering the tax laws.

2. It was part of the said conspiracy that the defendants unlawfully, wilfully and knowingly, would directly and indirectly, corruptly give offer and promise sums of money, gratuities, and other things of value to a public official who was an employee of the

Indictment

Internal Revenue Service of the United States Treasury Department with intent to influence an official act of the said public official, to wit, to influence a Revenue Agent of the Internal Revenue Service, not to assess tax liability shown to be due and owing on the short year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967 to August 31, 1967 and the corporate tax return of Sutton and Sutton, Ltd for the fiscal year ending August 31, 1968 by finding no change audit for the above specified periods.

OVERT ACTS

In furtherance of the said conspiracy, and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about the 1st day of September, 1970 the SUTTON and ABRAHAM SUTTON met with an employee of the Internal Revenue Service.

2. On or about the 22nd day of September, 1970, 7the defendants CHARLES R. HARARY, MEYER SUTTON and ABRAHAM SUTTON met with an employee of the Internal Revenue Service.

3. On or about the 22nd day of September, 1970 the defendant, CHARLES R. HARARY, gave the sum of

$1250.00 to an employee of the Internal Revenue Service.

(Title 18, United States Code, Section 371.)

SECOND COUNT

The Grand jury further charges:

On or about the 22nd day of September, 1970, in the Southern District of New York, CHARLES R. HARARY, MEYER SUTTON and ABRAHAM SUTTON, the defendants, unlawfully, wilfully, knowingly, and corruptly did directly and indirectly give offer and promise things of value, including but not limited to money in the amount of $1250.00, to a public official who was an employee of the Internal Revenue Service of the United States Treasury Department, with intent to influence an official act to be performed by said public official, to wit, the income tax audits of Sutton and Sutton, Ltd., on the short year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967 to August 31, 1967, and the corporate tax return of Sutton and Sutton, Ltd., for the fiscal year ending August 31, 1968.

(Title 18, United States Code, Sections 201(b) and 2.)

Indictment

THIRD COUNT

The Grand Jury further charges:

On or about the 22nd day of September, 1970, in the Southern District of New York, CHARLES R. HARARY, MEYER SUTTON, and ABRAHAM SUTTON, the defendants, unlawfully, wilfully and knowingly did directly and indirectly give, offer and promise things of value, including but not limited to money in the amount of $1250.00, otherwise than as provided by law for the proper discharge of official duties, to a public official who was then and there an employee of the Internal Revenue Service of the United States Treasury Department, for or because of official acts performed and to be performed by said public official, to wit, the income tax audits of Sutton and Sutton, Ltd. on the short year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967 to August 31, 1967 and the corporate tax return of Sutton and Sutton, Ltd., for the fiscal year ending August 31, 1968.

(Title 18, United States Code Sections 201(f) and 2.)

FOREMAN

WHITNEY NORTH
SEYMOUR, JR.
United States Attorney

Excerpts from Opening Statement of Counsel for Defendant Harary

[8] MR. FAWER: * * *

Now, it has long been the policy of our government and of any civilized society — and one which I don't quarrel with and I don't think anybody quarrels with — that it's the function of the government to bring to justice those who bribe or corrupt our public officials. It's the job of the government to route out and to bring to justice those who would bribe, just as it is the duty of the government to bring to justice any other criminal.

They have an entire army of investigators [9] dedicated to this function, this law enforcem nt function. But these investigators, ladies and gentlemen, are paid to catch criminals, not to create them; and that is at the crux of this case.

The government, as his Honor will charge you at the end of the case, is forbidden to implant in the mind of a defendant the idea of committing a crime and then seeking to convict him when he commits the crime. This prohibition on governmental conduct is as deeply rooted in our system of justice as is the jury system itself.

There is no issue in this case that $1250 was paid to Agent Ostrow; it was paid. We do not deny it, we never have denied it. That is not the problem in this case.

The problem is whose idea was it that $1250 or that a sum of money be paid to the government agent? Was it the defendant's idea from the start, or was the idea suggested, insinuated, intimated by the agents in an effort — by the agent Ostrow in an ef-

Excerpts from Opening Statement of Counsel for Defendant Harary

fort to entrap the defendant into committing the crime that was committed. For if it was the agent's idea, this defendant has no business in this courtroom.

We will demonstrate, ladies and gentlemen, by the evidence, not through what I am saying, but from [10] the lips of the people who will be on the witness stand, particularly their own witnesses, that Agent Ostrow, contrary to the way Mr. Phillips described it, was not just conducting a formal civil audit of a corporation's tax return; he was there under the guise of conducting such an audit, but, in fact, he was operating under the specific direction of a very particular unit in the Internal Revenue Service. In fact, and we will show this — his real function from the outset was to make a bribery case against Meyer and Abraham Sutton if it meant persuading, cajoling and inducing them into the crime that was committed.

We will demonstrate that Agent Ostrow implanted in the minds of the defendant the idea of his taking a bribe. He didn't say, as such, "I want $1,250" — he didn't have to — but you listen to what he did say and it was perfectly crystal clear that what he was telling this citizen was that "I want money for walking out of here, before I walk away from this audit."

In listening to the evidence, keep in mind the very power of an internal revenue agent who is conducting an audit of a taxpayer. Keep in mind the meaning of words and the context in which they are used. That is [11] at the very heart of this case. And keep in mind and listen carefully to all that transpired before $1250 was agreed to be paid to the agent.

Excerpts from Opening Statement of Counsel for Defendant Harary

As I said a minute ago, what I say isn't evidence in this case, what Mr. Phillips said is not evidence in the case. The only evidence in the case is what you will hear from the witnesses on that witness stand, and that is what I want you to base your verdict on and I know you will. What is important and what controls is your impression, your recollection and your common sense.

When all of the evidence is in in this case, I am sure you are going to recognize this prosecution just for what it is, merely an insidious case of overreaching on the part of the government in an attempt to entrap Abraham and Meyer Sutton, and it's a case in which their accountant, who had absolutely nothing to gain by this, was caught in the middle of the government's efforts to ensnare Meyer and Abe Sutton.

The government will be able to show without question that $1250 was paid — we won't argue that — but I submit to you — and this is what is going to be your function — that they, the government, will be wholly unable to prove to you beyond a reasonable doubt [12] that the government didn't implant in the minds of the defendant the idea of paying the bribe.

* * * *

Excerpts from Testimony of Harold Wenig

[309] HAROLD WENIG,
called as a witness by the government, having been first duly sworn, testified as follows:

* * * *

[313] Q What occurred after Mr. Klein appeared?

A When Mr. Klein appeared Mr. Harary went into another room with Mr. Klein and they conferred together.

Q And then what happened?

A Subsequently they reentered the office of United States Attorney Andrew Maloney and at that time Mr. John Sale was present, myself, Mr. Irwin Klein, Harary's attorney, Mr. Harary and Andrew Maloney.

At that time once again Mr. Maloney gave Mr. Harary his constitutional rights, as I stated them before, and at that point he started to ask Mr. Harary questions.

Q What questions did he ask him; do you recall?

A Yes. The first question he asked was, he paid a bribe of $1250 to Revenue Agent Ostrow; and he answered "Yes."

He was then asked who was instrumental in pushing the bribe, and Mr. Harary stated that the Sutton Brothers, Abraham and Meyer Sutton, were the ones that pushed him into paying the bribe.

He was then asked why the bribe was paid. And Mr. Harary stated that during the examination of the corporation, of the tax returns involved, he was giving Mr. Sutton, both brothers, a blow-by-blow description of what was going on. He told the brothers that there

Excerpts from Testimony of Harold Wenig

was a [314] possibility that there would be a $60,000 tax assessment because of the unsubstantiated capitalization.

Mr. Harary stated that the brothers — no, that people, that people didn't like to be audited and they knew that if the agent looked long enough, he was going to find something wrong. In essence, he stated that they were trying to shorten the audit as rapidly as possible.

He then stated that after the first meeting he felt and the Sutton Brothers felt that the agent was approachable.

Mr. Harary was then asked, "Who initiated the bribe offer?"

And Mr. Harary stated "I initiated the bribe offer, not the agent."

Q Did he specifically say "Not the agent"?

A Yes, sir, definitely.

Q Did he say anything else about this transaction?

A Yes. He was asked "How much money he had asked the Sutton Brothers to pay off the agent." and he stated that he asked the Sutton Brothers or told the Sutton Brothers that the agent had agreed to a $2,000 bribe and that he was going to give the agent $2,000.

I asked him, had he kept any of that $2,000 for himself?

[315] He said, "yes," he had, that he kept $750 of that $2,000 for himself and did not tell the agent nor the taxpayers that he was keeping that $750.

* * * *

[448] MR. FAWER:

Your Honor, at this time I would move to dismiss all of the gratuity count, count 3. It is perfectly clear, your Honor, number one, that what we are talking about here, what the indictment has charged as both the bribe and the gratuity is the $1250. It very specifically refers to the facts that took place on September 22 in each count. There is no question about that.

The indictment couldn't be more express in that sense. Everyone knew what occurred on the first. When the indictment was drafted it was drafted as to the 22nd. The point being, your Honor, I think it is clear that in this situation it either was a bribe, the 1250 either was a bribe, or the jury is going to accept the defense of entrapment.

It would seem to me — and I think your Honor with all due respect would have to charge the jury that they could not bring in a verdict on both [449] counts. I think the risks I am running in asking this, I think that this count of the indictment as well as the conspiracy count, your Honor, should be dismissed; that this case should go to the jury for what it is, an alleged bribery case pure and simple with a question of entrapment in the case. That is really what this case is all about and nothing more.

THE COURT:

Mr. Phillips?

MR. PHILLIPS:

Your Honor, the jury is still entitled to find that

there was a gratuity paid, that the money was not paid to influence the officials act and therefore there is no reason why the gratuity count should not remain in. The jury still has to find all the elements of the crime. It's not a matter just because defense counsel want to argue that the main issue in the case is entrapment, there still are the other elements of the crime which the jury must find and if they find the payment was made but not made to influence Agent Ostrow's official public act then they could still find the defendant guilty of the gratuity count.

THE COURT:

What about Mr. Fawer's argument that they can't find him guilty of counts 2 and 3.

MR. PHILLIPS:

I agree, your Honor, I [450] agree they have to find him guilty and I think your Honor has to charge the jury on that, they have to find the defendant guilty of one and two but they cannot find the defendant guilty of both.

THE COURT:

Motion denied.

* * * *

Excerpts from Summation of Counsel for Defendant Harary

[465] MR. FAWER:

* * * *

The crucial issue in this case — and the Court will so instruct you after I have summed up and Mr. Phillips has summed up — is whether the idea of the bribe was Mr. Harary's from the outset, or whether in fact it was suggested, intimated, or induced by the government Agent Ostrow in this case.

Unless in your mind you can say that it is clear beyond a reasonable doubt, beyond a reasonable doubt, that Ostrow didn't solicit the bribe, you must acquit Mr. Harary.

* * * *

[498] MR. PHILLIPS:

* * * *

That's what this human being is telling another human being. Harary is arrested. He's in the same apprehension. They take him down to the U. S. Attorney's office. He admits the bribe. He admits that he did it on behalf of the Suttons. He admits that he kept $750 for himself.

When they ask him, "Did you first mention the mon-

ey or did the agent?" he says, "I mentioned the money first." That's the truth. He did. The first one to mention a dollar amount was Charles Harary. We admit it. No question about it. Keep in mind something: That arrest takes place one week after September 22. In that period of time the government [499] had had an opportunity to do what? They had an opportunity to listen to the tape and they know what that tape said.

Do you know what that tape said? Entrapment all over it.

* * * *

I submit to you that they were aware that there was an entrapment in this case and as two assistant United States Attorneys are questioning [500] him, and they put the specific question because they see coming down the road is Mike Fawer who is going to raise the very defense that should be raised in this case, entrapment, to get this man on record. He had an attorney with him then. According to Mr. Wenig, he was questioned by 15 minutes.

At that joint in time Charlie Harary was telling anything. He did. He told not a single lie. You look at it. Think about that testimony. It tells just what happened.

You ask yourself who introduced the bribe? That's what you have to know in this case. You have to be able to decide it. I can't. You have that responsibility.

Excerpts from Summation of Government Counsel

I submit, ladies and gentlemen, you have been exposed in this case to a reprehensible, to accurately state it, despicable picture of your government toying with human lives, lives of each of us who are citizens. They forced in this instance and, according to Inspector Wenig, can properly force a person to run a gauntlet which would not have existed but for their creating it. That is as crystal clear as can be in this case. That is the conduct that Inspector Wenig and the government by this prosecution says they have a right to [501] engage in.

You must decide beyond a reasonable doubt whether you can say: Agent Ostrow did not in any way induce or suggest the bribe of $1250.

* * * *

[502] MR. PHILLIPS:

Thank you, your Honor.

May it please the Court, Madam Forelady, ladies and gentlemen of the jury Mr. Fawer:

In case you have forgotten, I am the Assistant United States Attorney who presented the government's case and who has sat by quietly listening to five hours of cross-examination of Agent Ostrow and approximately almost an hour of Mr. Fawer's argument setting up an incredible smokescreen before you.

That is because everything is conceded in this case except for one thing. There's only one issue in this case. It is conceded that Agent — that Mr. Harary committed a crime by paying $1250, this money right

here, to an agent of the Internal Revenue Service, a public official, a person who is working for the Treasury Department, in order to influence that agent's actions in connection with an audit [503] examination.

It is conceded that he committed a crime despite the fact that they called character witnesses to testify that he has a reputation for being a law-abiding citizen.

What this case is about, ladies and gentlemen, is simply this:

A man was arrested for committing a crime. He confessed to committing the crime. He has decided that he now does not want to cooperate with the government but he wants not to be punished for the crime which he has committed and the only out he has is to try to convince you through an eloquent attorney that the government engaged in entrapment, instigated, initiated this commission of the crime by Mr. Harary.

If you think that the Inspection Service and what they conducted here, what they did here is a perversion of governmental power as Mr. Fawer puts it, then I agree that you should acquit this defendant.

But if you think that this is a perversion of governmental power, ask yourself one question: What would you do? What would you have the Inspection Service do if they had knowledge that there might be a pay-off in a similar situation?

They have referred over 100 cases to the Audit [504] Division over the past year alone. If what they

are to do, if what they did constitutes a perversion of governmental authority, then, ladies and gentlemen, they might just as well close up their shop and look for employment elsewhere.

Let us get our bearings here and let's go through the facts calmly and then we will discuss the one issue that is in question here, the issue of entrapment.

* * * *

[522] MR. FAWER:

May I just — just one or two points, your Honor. The first point I would make is that the government has submitted this case to the jury and, in fact, argued the case to the jury very expressly at page 502 in the first paragraph of Mr. Phillips' argument. I read the bottom of page 502, "That the issue" — that there is no issue, in fact. "It is conceded that what was done was done in order to influence that agent's actions in connection with an audit," etc.

That, in fact, is a correct statement of the way the case was put to the jury. That is the bribery [523] charge. There is no conceivable way this jury on the theory in which the case was put to them or on the facts could bring in a verdict supported by the evidence on the gratuity count, which has no influence necessary.

It seems to me that if the gratuity count goes to

the jury, and I recognize I'm going out on a limb for this because it — I'm eliminating the possibility of a compromise verdict, but I think that including the gratuity count will merely confuse the issue in the minds of the jury because they are going to be instructed on a set of — on a law which has no applicability to the facts that came before them or to the arguments on those facts already before them.

I submit, your Honor, that the gratuity count should be removed from the case prior to its submission to the jury.

THE COURT:

Mr. Phillips.

MR. PHILLIPS:

This case is no different from any other bribery case that is tried in this court where the gratuity count is included and it goes to the jury. It's the jury's determination to decide whether — it's the jury's province to decide whether or not the money was paid to influence the agent's actions or whether it was paid because of or on account of the agent's [524] audit examination.

THE COURT:

I agree with you, Mr. Phillips.

Your application is denied, Mr. Fawer. We'll go out and charge the jury.

* * * *

Objections to Court's Instructions to the Jury

[557] MR. FAWER:

I would preserve my position after the charge I would object to your charge on the gratuity count and your drawing the distinction between the gratuity count and the distinction because in light of the facts and the manner in which the case was submitted to the jury this was merely — it merely obfuscates the [558] problem. There was no basis for a conviction on the gratuity count in terms of the evidence and the manner in which the case was submitted to the jury.

* * * *

Excerpts from Robing Room Conference Immediately Preceding Second Trial

United States of America

versus 70 Crim 1104

Charles R. Harary,

Defendant.

New York, June 1, 1971;
10:00 o'clock a.m.

Before:

Hon. Charles M. Metzner,

District Judge.

Appearances:

For the Government:

Walter M. Phillips, Jr., Esq.,
Richard Toder, Esq.

Excerpts from Robing Room Conference
Immediately Preceding Second Trial

For the Defendant:
Michael Fawer, Esq.
Herbert Burstein, Esq.

(In the robing room)

THE COURT:
Yes, Mr. Fawer?

MR. FAWER:
Just one or two items, your Honor, if I might.

Your Honor, since this is a retrial of the case which occurred two weeks ago, it's pretty clear that the evidence has been laid before the Court and that we all pretty much are aware of what the extent of that evidence is. In view of it, your Honor, again I would renew a motion I made during the course of that trial and I think [2] it would be appropriate to make it again now.

No. 1, I would move for the dismissal of the count, Count 3, the gratuity count. Again I would state, your Honor, that there is absolutely no theory on which that count can go to the jury and I realize I am early, premature with this motion, since obviously it's a motion that could be made at the end of the Government's case or the trial but I think it's appropriate to be made now.

I think it should not be in this case. The theory of the Government, the theory on which everything

Excerpts from Robing Room Conference
Immediately Preceding Second Trial

is going to the jury and will go again is that the payment which was made, and no one is questioning that, was made with intent to influence. The only conceivable defense is the entrapment defense. In the course of that, I think there is no reason for the jury to be permitted to speculate or compromise on a count which they could not bring a guilty verdict in on on the theory upon which the case is being presented to them.

I would therefore move for a dismissal of the gratuity count in this case.

THE COURT:

Mr. Phillips?

MR. PHILLIPS:

Your Honor, I think this is a motion that should appropriately be made at the close of [3] the Government's case but the Government's position is the same as the last trial. The jury is entitled —

THE COURT:

The motion is denied with leave to renew at the end of the Government's case.

* * * *

Excerpts from Opening Statement of Government Counsel

[4] MR. PHILLIPS:

May it please the Court, Madam Forelady, ladies and gentlemen of the jury, Mr. Fawer and Mr. Burstein:

The defendant in this case is charged with bribing an agent of the Internal Revenue Service, the Treasury [5] Department, in order to influence that Revenue Agent's actions in connection with his official duties. Specifically he is charged with paying him the sum of $1,250 on September 22nd, 1970.

What he is charged with is contained in this indictment, but the indictment is not evidence. The indictment is merely the formal way of informing the defendant of the charges against him.

The evidence comes from the witness stand in the form of testimony from live witnesses. It also comes from the form of exhibits, and it is based solely on the evidence from the witness stand and the exhibits that you as the triers of the facts in this case must make your determination of the guilt or innocence of the defendant after you hear his Honor's instructions at the close of the case.

The government's proof in this case will establish the following: That the Inspection Service of the Internal Revenue Service, which is an investigative branch of the Internal Revenue Service, and whose function it is to investigate corruption among employees of the Internal Revenue Service as well as corruption among tax practitioners generally, had certain information concerning Meyer and Abraham Sutton, who owned a corporation called Sutton Bros. Ltd.

They referred the matter to the audit division of

Excerpts from Opening Statement of Government Counsel

[6] the Internal Revenue Service and Agent Ostrow, Larry Ostrow, was assigned to conduct an audit examination of the corporat tax returns for the short year 1967 and the fiscal year ending August 31, 1968.

Ostrow commenced his audit examination on September 1st, 1970 and he went to the premises of the Sutton Bros. Ltd. at 1204 Broadway. There he met the defendant Harary in this case, who was the accountant for the Suttons. They discussed among other things — first they had general discussion, and when Agent Ostrow commenced his examination, he brought up an item on the income tax returns which consisted of $199,000 capitalization and he questioned Mr. Harary about this.

Mr. Harary indicated that this money had come in from some relatives of the Suttons from Syria or Israel and that it was capitalization.

Thereafter, on the same day, they had lunch. During lunch or at the end of lunch, Mr. Harary offered Agent Ostrow a prostitute, the services of a prostitute, said he would pay for the prostitute if Agent Ostrow was interested.

Agent Ostrow declined that offer.

They went back, commenced the audit examination and at the close of the day, approximately four o'clock, Agent Ostrow and Harary went and had drinks. Over drinks [7] they had further conversation and at that time Harary offered Ostrow a camera. He pulled out the camera, it was a Yashica camera and offered it to him and when Agent Ostrow de-

Excerpts from Opening Statement of Government Counsel

clined, he said to him that he would sell it to him at cost, for $150, although the camera was worth more than that.

Agent Ostrow declined and he reported to Inspector Wenig the following day.

As a result of what happened on the first of September, a subsequent meeting was made between Harary and Agent Ostrow in order to conduct the audit examination and that meeting was for September 22nd, 1970; prior to going to the Sutton Bros. premises at 1204 Broadway on the 22nd, Agent Ostrow was equipped with an electronic device to tape the conversation between Harary and Sutton or whoever would be there and he was also searched for the amount of money that he had in his possession.

He went to 1204 Broadway and he continued the audit examination and this time Meyer Sutton was there and participated in the conversation which again came around to this capitalization of $199,000.

Meyer Sutton insisted that the money had come in from relatives in Syria or Israel — Syria. He said that he had letters to substantiate this and Agent Ostrow said that the [8] letters were not sufficient substantiation; he needed cancelled checks or something more than merely the letters.

Meyer Sutton also asked him what he could do and the matter was left unresolved when they went to lunch, Meyer Sutton, the defendant Harary and Agent Ostrow.

When they returned from lunch they started to dis-

Excerpts from Opening Statement of Government Counsel

cuss the capitalization again, this time just Agent Ostrow and Harary. After only about five minutes after they discussed this matter, upon returning from lunch, Harary offered Agent Ostrow a bribe in the form, generally in the form of either compensation or women.

Agent Ostrow didn't say anything and they discussed other matters. Harary came back to the matter and offered him a specific bribe of $250. When Agent Ostrow didn't immediately accept Harry raised it to $500. Agent Ostrow didn't immediately accept and Harary raised it to $750. He even raised it to $1,000 indicating to Mr. Ostrow that he would keep $250 and give $750 to Agent Ostrow.

Finally when Harary mentioned the sum of $1250 Ostrow accepted his offer. Thereafter Harry left the room returned and said that Abe Sutton would go and the money and they waited for him. They waited approximately one hour and then Harary decided that they would complete the transaction the following day.

[9] They left the building, Harary had a change of heart and decided that the matter should be completed that day, so they returned to the building and shortly thereafter Sutton returned with the money.

Sutton then gave Harary $2,000. Harary kept $750 for himself and gave $1250 to Agent Ostrow.

Agent Ostrow, in turn, turned the money over to Inspector Wenig.

One week later, as a result of this, Harary was ar-

Excerpts from Opening Statement of Government Counsel

rested. He was arrested by Inspectors of the Inspection Service and he was brought to this courthouse for arraignment before the Commissioner. He was brought for a pre-arraignment interview before two Assistant United States Attorneys, Andrew Maloney and John Sale, and he was brought here by Inspector Wenig.

He asked if he could have a minute and he was given a minute whereupon he called his attorney Irwin Klein, not the attorney who represents him at the trial. Thereafter his attorney came down, in the presence of his own attorney Mr. Harary confessed to giving the bribe to Agent Ostrow. He admitted that he had kept $750 for himself and had paid $1250 to Agent Ostrow.

He was asked if it was initiated by himself or by the agent and he said that he himself initiated the bribe [10] offer.

As I said, ladies and gentlemen you must decide this case based on the evidence from that witness chair and the exhibits which are introduced.

I ask you at this time to keep an open mind as you listen to the evidence as it comes in.

I submit to you that this is an overwhelming case that the government will prove the defendant's guilt well beyond any reasonable doubt and that I will have a chance to address you at the close of the case.

Excerpts from Opening Statement of Counsel for Defendant Harary

[11] MR. FAWER:

May it please the Court, Mr. Phillips, Mr. Burstein, ladies and gentlemen of the jury:

My name is Michael Fawer, and I represent Charles Harary, an accountant, who is charged. as Mr. Phillips and his Honor have said, with bribing, conspiracy to bribe a revenue agent and to bribe on behalf of two clients of his, Abraham and Meyer Sutton. Neither of them are on trial, as his Honor has stated to you.

The charges are contained in an indictment, in a document, and that document is no evidence in this case, as the judge has told you. It is merely the means by which Mr. Harary is advised of what the Government has charged him with.

Now, it is important that you bear this in mind. All too often in speaking to people outside the courtroom you get the impression that laymen, non-lawyers, people not involved with the law, think there is some significance to this document. There is none. It has no meaning in terms of evidence. A grand jury who returned this indictment heard only one side of the story. You ladies and gentlemen and you alone are the first body, the first impartial body to hear both sides, and that is the whole key to our system. You are going to hear Mr. Harary's side of the story, and it has not been heard [12] of by anybody before.

To put into focus and to do away with for all time the very meaningless of this document as a piece of evidence, bear in mind that every defendant ever ac-

Excerpts from Opening Statement of Counsel for Defendant Harary

quitted in any courtroom in this country was first charged by a piece of paper like this indictment. That is the very basis of the working of our system.

It has always been the policy of the Government, a policy with which I agree, and I am sure you do, to bring to justice those who would corrupt our public officials. We all endorse such a doctrine. It is the job of the Government to root out corruption as much as it is their job to root out crime of any sort.

The Government has a vast body of investigators charged with this function. They are paid, however, ladies and gentlemen, to catch criminals, not to create them. The Government is forbidden to implant of any one of us the idea of committing a crime and then convicting, seeking to convict a person based on their implanting that idea in the person's mind, and this prohibition on Government conduct is as deeply rooted in our system of justice as is the jury system itself.

Why do we have this rule? What does it mean?

The rule is a recognition of the vast, immense [13] power of the Government as opposed to the normal human weakness of the most innocent of men when faced with certain kinds of subtle inducement and pressures. It is a recognition that the Government, our Government is here to protect us against criminals, not to put ordeals in our path to see if a given individual will succumb to temptation and fall into sin. That is not their function, and that is why we have this policy in the law.

There is no issue in this case as to whether money

Excerpts from Opening Statement of Counsel for Defendant Harary

was paid to Agent Ostrow. It was. We admit it. We have never denied it. $1,250 was paid by Charles Harary on behalf of the Suttons to Agent Ostrow. That is not an issue in the case, because we all agree that occurred. What is in issue and which is the key issue is, whose idea was the payment of that money? Was it the defendant's idea from the start, or was the idea suggested, insinuated, broached, intimated by the agent in an effort to entrap Mr. Harary into giving this bribe? For if it was the agent's idea, then the defendant has absolutely no business in this courtroom.

We will demonstrate, based on the evidence from that witness stand, that Agent Ostrow was not conducting an ordinary civil audit of the corporation tax returns of the Suttons. In fact, he was conducting a very special [14] type of audit under the direction of a very particular unit of the Internal Revenue Service. He was there under the guise of conducting an ordinary audit, but in fact he was not there for that purpose at all, and, indeed, Agent Ostrow is no ordinary revenue agent. His real function, ladies and gentlemen, from the outset was to make a bribery case against the Suttons, even if it meant inducing or persuading them into engaging in this course of criminal conduct.

Now, this is a very harsh charge that I am making against our Government, but by your oath you have sworn not to shrink away from the reality of facts, no matter how ugly they might be, and you are

Excerpts from Opening Statement of Counsel for Defendant Harary

charged with that, and I ask you to live with that oath.

We will demonstrate that Ostrow implanted the idea of the bribe in the mind of the defendant. He did not say, "I want $1,250." He didn't have to. But what he did by his words and by his actions made it crystal clear that he wanted money, that he was there for money; he wanted money to pass. This will become clear from the evidence in the case.

In listening to the evidence, just keep in mind the power of a revenue agent inquiring into the financial affairs of a private citizen. Keep in mind the meanings [15] of words and the context in which they are used. Listen carefully to what transpired and what Ostrow said before the defendant succumbed and offered the bribe.

Don't take my work for all of these things. I don't ask you to do that. Listen to the testimony as it will come out of the lips of their witnesses and see if what I say is not borne out by the facts.

The only evidence comes from those witnesses, and we ask only that you impose on what is said your own common sense, your own good judgment to reach a decision on that basis.

When all of the evidence is in, I am sure you will recognize this prosecution just for what it is: A blatent case of perversion of the governmental function, a case in which the Government was involved in overreaching in an attempt to entrap the Suttons, a case in which Charles Harary, their accountant, Suttons'

Excerpts from Opening Statement of Counsel for Defendant Harary

accountant was the patsy caught in the middle.

The Government will be able to show you — I guarantee it — that $1,250 was paid to Agent Ostrow, but we submit — and I submit this will be proven by the evidence — that they will be wholly unable to prove, as they must, beyond a reasonable doubt that the idea of the bribe was not of their own making. That they will [16] be unable to do, and for this I ask only that you listen as attentively as you can to the evidence as it unfolds.

Thank you.

THE COURT:

Call your first witness.

MR. PHILLIPS:

Government calls Lawrence Ostrow.

LAWRENCE OSTROW,

called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PHILLIPS:

Q Mr. Ostrow, by whom are you employed?

A Internal Revenue Service.

Q In what capacity?

A I am currently a classifying agent.

Q Would you keep your voice up so each of the members of the jury can hear you?

A Yes, sir.

Excerpts from Testimony of Lawrence Ostrow - Direct

Q In August of 1970, how were you employed?
A I was employed as a field auditor.
Q How long have you been with the IRS?
A Approximately four years.
Q As a field auditor, what were your duties?
A To conduct audit examinations of different tax [17] returns.
Q How long were you a field auditor?
A Approximately three and a half years.
Q Do you know a man by the name of Harold Wenig?
A Yes, I do.
Q What does he do?
A He is an inspector with the Internal Revenue Service.
Q Is he with the Inspection Service?
A Yes, he is.
Q Are you familiar with the function of the Inspection Service?
A Yes. I believe it is to investigate misconduct of employees and any misconduct of tax practitioners and taxpayers.
Q Did you have occasion to meet with Inspector Wenig in August of 1970?
A Yes, I did.
Q Where did that meeting take place?
A At his offices.
Q Here in Manhattan?
A Yes.
Q Would you tell the jury where your offices and his offices are?

Excerpts from Testimony of Lawrence Ostrow - Direct

[18] A My office is located at 120 Church Street and the Inspection's offices are located at 26 Federal Plaza. They are both in the downtown area, about ten-minute walk apart.

Q 26 Federal Plaza is right across the street from the Court House, isn't it?

A Yes.

* * * *

[19] Q As a result of your conversation with Inspector Wenig, what occurred, Agent Ostrow?

A Prior to my conversation with Inspector Wenig, I had received a tax return from my group supervisor of Sutton & Sutton, Ltd., and I had contacted taxpayers and arranged for an appointment with them, with Mr. Harary, the taxpayer's accountant, to meet with them on September 1st to conduct an audit of the tax return of Sutton & Sutton, Ltd.

Q Who were the taxpayers in this case?

A The taxpayers are Sutton & Sutton, Ltd. It was [20] a corporation.

Q Did you go there on September 1, 1970?

A Yes, I did.

Q Where did you go?

A I went to the offices of the taxpayer at 1204 Broadway.

Q Did you meet their accountant, Mr. Harary?

A Yes, I did.

Q Do you see him in the courtroom?

A Yes, I do.

Q Would you point him out, please?

Excerpts from Testimony of Lawrence Ostrow - Direct

MR. FAWER:

The identification is conceded, your Honor.

THE COURT:

All right.

Q Did you meet him in the morning of September 1, 1970?

A Yes, I did.

Q Did you have a conversation with Mr. Harary during the morning regarding the returns?

A When Mr. Harary — when I first met Mr. Harary, we had some general conversation. Then about after a half hour of this general conversation, I began to conduct my audit of the tax returns and questioned various items to Mr. Harary.

[21] Q Was there any specific item that you talked to Mr. Harary about?

A Well, we — I mentioned various questions and one item in particular I mentioned was capitalization on the corporation.

MR. PHILLIPS:

May these be marked Government's Exhibits 1 and 2 for identificaton.

(Government's Exhibits 1 and 2 were marked for identification.)

Q I show you Government's Exhibits 1 and 2 for identification, Agent Ostrow. Are you able to identify those?

A Yes. These are the two returns of the Sutton & Sutton, Ltd.

Excerpts from Testimony of Lawrence Ostrow - Direct

Q These are the returns you were doing an audit examination of, is that correct?

A Yes, it is.

BY THE COURT:

Q Which one is 1 and which is 2?

A There is a fiscal one ending August 31, 1967. This is the initial return on the corporation.

Q How long a period did that cover?

A That was only from July 21 to August 31 of 1967.

Q July 31, 1967?

[22] A July 21.

Q To August 31?

A Yes, your Honor.

Q And the second?

A The second return was the fiscal year from September 1, 1967, until August 31, 1968.

THE COURT:

Thank you.

BY MR. PHILLIPS:

Q Would you explain to the jury why there was the first short year return?

A Well, the first short year return was just to establish an accounting period. It was the taxpayer's first year in business and Mr. Harary stated to me that they had incorporated in July of 1967 and to establish a fiscal year ending in August, they are permitted to file a short period return and after that they have

to file on a calendar — on a continuing fiscal year basis.

Q Would you explain to the jury what an audit examination is, what it consists of and what its purpose is?

A An audit examination consists of verifying items that appear in the return such as income items, expense items and there are also balance sheet audit items which you will also question.

Q Do you have to make a report as a result of your [23] examination?

A Yes, I do.

Q What type of report is that?

A Well, I report to my supervisors and also our Review Section that — of the extent of my audit. The items that I questioned ,the substantiation that I received, of the good items, if this an agreed case. If the case is unagreed, I also state to the extent of my audit and I also state the items that were unagreed and give the information that was submitted by the taxpayer.

Q When you mentioned substantiation, what do you mean by substantiation?

A I mean the items that are back-up for the items claimed on the return such as an expense item, maybe canceled checks; income item will be a deposit ticket, accounts and any item that would substantiate what the claim is on the return.

Q You mentioned that you specifically had a conversation about certain capitalization that appeared on one of those returns, is that correct?

Excerpts from Testimony of Lawrence Ostrow - Direct

A Yes, we did.

Q On which return does that appear?

A On the fiscal 1968 return.

Q Government's Exhibit 2 for identification?

[24] Is that Government's Exhibit 2 for identification?

A Yes, it is.

Q Where does that appear on the return?

A It appears on the balance sheet?

Q What was your conversation with Mr. Harary regarding that particular item?

A Well, being the first year of the corporation, I questioned to Mr. Harary if these items, if he could substantiate to me the source of these items, where the money had come from to capitalize this corporation.

Q What did Mr. Harary say to you?

A At that time Mr. Harary stated that the taxpayers had had an estate in Israel and these moneys were transmitted over to the United States by the source he didn't know but these were transmitted to the taxpayer.

Q Did he show you any substantiation at that time for these items?

A At that time, no, he did not.

Q Did you have lunch with Mr. Harary that day?

A Yes, I did.

Q Did you have a conversation with him at lunch?

A Yes. During lunch we had a general conversation and toward the end of lunch, Mr. Harary stated that previously he had been propositioned by some

prostitutes [25] in the area there at a hotel which was close by and asked if I would like to take a walk there and see if they are in front of the building as they were before.

Q And did you take a walk with Mr. Harary after lunch to the hotel?

A Yes, I did.

Q What occurred? Did you have a conversation at the hotel or during the walk?

A When we got by the hotel, these prostitutes that Mr. Harary had referred to weren't there and at that time he stated to me that any time that I would like the services of a prostitute just to let him know and he could arrange it. Also he stated that he would pick up the tab on it, it would be, the cost would be incurred by him.

Q What was your response to him?

A I denied his offer. I refused his offer.

Q Excuse me?

A I refused his offer.

Q Did you continue your audit examination after lunch?

A Yes, I did.

Q What time did you finish that day?

A Approximately 4 o'clock. We had reached the [26] point to stop and I was going to leave at that time.

Q Had the matter of the $199,000 capitalization been resolved by 4 o'clock when you finished?

A No, it had not. Mr. Harary and myself had agreed to meet September 22 at which point he would have the substantiation for this item, plus an inventory

item and a few other items I had requested substantiation for and also he would have copies of the taxpayer's individuals returns and a few other of their corporate returns that I had also asked for of that date.

Q What occurred when you finished that day on the 1st of September?

A Well, I finished and was about to leave. As I was leaving, Mr. Harary asked if I would like to have a drink with him. He insisted that I go to have a drink with him and I agreed to go then and we walked around the corner to the restaurant we had had lunch at and, as we left the premises, Mr. Harary picked up this brown paper bag which was sitting by the door of the entrance to the corporation's offices and brought it with him. At that time I didn't know what was in the bag.

When we got into the restaurant, we sat down to the bar and ordered a drink and Mr. Harary produced this camera, which was a Yashica camera. He brought it out of [27] the bag and put it in my hands and told me I could have it.

Q How much was the camera worth? Do you know?

A Over $200.

Q What did you do when he offered you the camera?

A I refused the camera at that point, saying that it wouldn't be right that I take the camera and he insisted, he again stated, "Take the camera, it's all right," and I again refused it and he — at that time he made a remark stating that he could let me have it for what it had cost him and he mentioned $15,

which we both laughed about because it was a very small sum.

Q Did he say where he had gotten the camera, whose camera it was?

A Yes. He stated that it had been received from one of the Suttons' other stores, that he had had someone pick it up. I believe he mentioned Al Sutton picked it up from one of the other stores.

Q After you left on the first, did you see Inspector Wenig again?

A Yes, I did.

Q When was the next time you saw him?

A The morning of the 2nd, I called Inspector Wenig and reported to him that an attempt had been made [28] to give me the services of a prostitute and a camera and that afternoon I went down to his offices and gave him an affidavit to that effect.

* * * *

Q Did you return to the Suttons' office on September 22, 1970?

A Yes, I did.

Q Before going there that day, what if anything did you do?

A In the morning of that day I reported directly to the Inspector's offices as I had been directed and at which time I was then searched to see the amount of money I had on my person, which was approximately $20, and also I was equipped with electronic equip-

ment to record any conversations during the day at the taxpayer's premises.

Q Did anybody accompany you to the Suttons' offices?

A Yes. There was Inspector Wenig and some other inspectors.

Q You went into the office alone, is that correct?

[29] A Yes, I did.

Q Would you describe the Suttons' office?

A To the best of my recollection, the Suttons' office is when you first entered the building, there was one room in which there was a receptionist and as you proceeded into the building, there was a showroom and directly — a door directly off the showroom which was, I believe, one of the Sutton's offices. I believe Mike Sutton. I subsequently found out who occupied that office. I believe it was Mr. Mike Sutton.

Then, off to the side there was a corridor which led to another office in which I worked, which I believe was Mr. Al Sutton's office and there was one other room behind that in which some clerical help worked.

Q Did you see Mr. Harary that morning?

A Yes. He came in that morning.

Q Did you see either or both of the Suttons that morning?

A Yes. When I first came in, I was met by Mr. Al Sutton and we went into his office and had some general conversation and I saw an individual who — later I met him that day, who was Mike Sutton. I had seen him the time before but I had never met him and then about a half hour later Mr. Harary

came in.

[30] Q Just to get it straight, Mike Sutton is Meyer Sutton and Al Sutton is Abraham Sutton, is that correct?

A Yes.

Q Was there further discussion that morning regarding the $199,000 capitalization item on the income tax return?

A Yes, there was.

Q Who participated in that discussion?

A Well, the discussion — after Mr. Harary and I had had some general discussion, we continued on with the audit and he produced the various items that I had previously asked for. He produced copies of the individual returns, some copies from the corporate returns, and I believe he produced inventory sheets which I previously requested and he had produced some letters.

I had asked for the capitalization substantiation and he produced some letters which he showed me at that time.

Q Do you recall what these letters said?

A I don't recall the exact wording of the letters or which letter said what specific items but in essence, they just told that the taxpayers had to flee from Syria and they had a large estate and someone was trying to liquidate it for them and as the letters [31] progressed one was an earlier dated letter; a subsequently dated letter stated that "We are still working on it, there is little hope," and another letter stated, I believe, that "We have succeeded in liquidating the estate and you are getting a small sum of the overall estate."

Excerpts from Testimony of Laurence Ostrow - Direct

Q What did these have to do with the capitalization item?

A These were the substantiation offered for the capitalization item.

Q To show that the money had come from Syria?

A Yes. This is what they presented.

Q Do you recall who the letters were from?

A I remember a name of Jack Nasser and he was a consulate. I don't remember the exact specifics at this point.

Q Was this sufficient substantiation that you could report to your superior?

MR. FAWER:

I object, your Honor.

A No.

THE COURT:

Overruled.

A No, it was not. This substantiation was just as though someone had told me the story. Anyone could write me the letter.

Q What type of substantiation did you require, did [32] you need?

A I required substantiation that was canceled checks, because it was stated to me that the money had come over by check, so, I of course asked for the canceled checks to see where the money had come from, that it was from a non-taxable source.

Q Did you tell the Suttons and also Mr. Harary what you needed in the way of canceled checks and so forth?

A Yes, I did. I was discussing the matter with Mr. Harary and at a point Mr. Harary stated that

for some of the information I wanted, I would have to ask the taxpayer and he brought in — Mike Sutton came into the room and Mike Sutton sat down and explained the story to me again about how they had to leave Syria and that the money was from an estate over there and I explained to him the type of substantiation which would be required, canceled checks, possibly notarized statements from third parties, saying that they had sent the money; if someone was going to submit a letter, to have it notarized.

Q What did Meyer Sutton say to you?

A Mr. Sutton stated that what I was asking would be very hard. He stated that these people that he was dealing with didn't want to admit to transmitting the [33] money because of the situation over there. He said it was very bad situation and that it would be very hard to get it and he asked me what type of information I would want to — that would make the item good and I again stated the various items of substantiation.

Q How long did you have this conversation with Meyer Sutton?

A The conversation with Meyer Sutton must have lasted from 45 minutes to an hour in where the taxpayer would tell me, ask me what I would need to make the item good and I would just reiterate the different types of substantiation I would need.

Q How many times did he ask you what did you need for substantiation?

A I don't remember the exact number of items but it was five or six or possibly a few more.

Excerpts from Testimony of Lawrence Ostrow - Direct

Q Did you give him the same answer each time, essentially?

A Yes, I did.

Q Did you explain to the Suttons and Mr. Harary what the alternatives were if proper substantiation was not produced?

A Yes. I explained to the taxpayer that I couldn't [34] verify the source of the funds, that the money hadn't come from a source where it had previously been taxed or wasn't subject to any kind of tax. Then, since they were the owners of the corporation, then I would have to tax the individuals on the money.

Q Did you tell them what their recourse was if you taxed them individually on the money?

A Yes, I did. Not recourse as to the tax but I did explain to them that if they didn't agree to anything that I had done, such as my adjustment, then they also had their right to conference, their right to appellate and their right to Tax Court.

Q Are these procedures within the IRS?

A Yes, they are.

Q Did you state to them what the tax would, what the amount of the tax would be on this amount of money?

A I approximately said that the tax would be around $60,000.

Q With whom did you have lunch that day?

A I went to lunch that day with Mr. Harary and Mike Sutton.

Q Do you recall what time you returned from lunch?

Excerpts from Testimony of Lawrence Ostrow - Direct

A We left approximately 12:30 to go to lunch and I believe we returned close to 2 o'clock.

[35] Q Do you recall what occurred after you returned from lunch?

A Yes. After we returned from lunch, Mr. Harary and myself went into the office we were working in and there we had a short general discussion and then Mr. Harary mentioned what else did we have to do, what had we left to do and the topic came up about the various items and also the capitalization.

I believe I had the inventory to look at and also the capitalization and at that point Mr. Harary said that he thought that had resolved the item and I explained to him that what was needed was the various items of substantiation and Mr. Harary at that time mentioned that the items was good and he mentioned compensation and at that point I said to Mr. Harary, "What do you want me to do," after he had mentioned this compensation.

He continued talking about why the item was good and these various things and we had a short discussion then again on what type of items would be required to make the item good, what items that would make this a good item.

Then again Mr. Harary mentioned "Maybe we can compensate you with some women or some money," and again I said, "What do you want me to do," and this time Mr. [36] Harary stated that he wanted me to accept the items, not to go into it any farther and say that it was good and after he had said this, I stated to Mr. Harary, "All right; is this what

you want me to do; go on, keep talking as to anything else you want me to do."

And then he said, "Well, maybe a small disallowance to make it look good," and he questioned possibly no change and then he mentioned that he would give me $250 and with my previous discussion with Inspection they stated to me that once an offer is made, I can bargain with the taxpayer but — and increase his offer and since an offer was made to me, I went ahead and just said to Mr. Harary, "You are making the offer, continue talking," and at that point he mentioned $500 and asked me what did I want and I never gave Mr. Harary a definite answer but in order to increase his offer, because what he was asking, the $250 for what he was asking, the type of adjustment and the type of taxes that should be forgotten, $250 was very small and I would either reply, "You know what we are talking about; we are talking about $60,000 in taxes. You are making the offer, continue talking," and subsequently Mr. Harary offered me $750 and then he went up to $1000 and then he went up to $1250 and at that point I had accepted his offer and —

[37] Q Did he say anything else when he offered you $1000?

A When he offered me $750, he stated that he would go out and ask the taxpayer for $1000 and keep $250 himself. He stated that.

Q What occurred after you accepted his offer at $1250?

A After I had accepted his offer, Mr. Harary went

out of the room and came back in about three or four minutes and I had asked him if he had the money and he stated no, that Al was going to get it.

Q Meaning Al Sutton?

A Yes.

Q What occurred while Al Sutton was gone?

A While we were waiting, Mr. Harary and I were in the office and we were waiting approximately an hour, we waited and we got impatient and at this point we decided then that I would come back tomorrow and pick up the money, so we both left the offices and went out in the street and then for some reason Mr. Harary got worried. He stated he was worried and we decided we would come back in and wait some more for Al Sutton and we returned to the offices and while we were in there discussing just general items, I had just asked Mr. Harary what he wanted me to [38] do and he decided on a no-change report — that I would give the corporation a no-change report and end my audit right there.

Q What is a no-change report?

A The no-change report is a report I submit to my superiors that there were no irregularities discovered upon audit and the taxpayer subsequently receives the letter stating that there are no additional taxes due for that year.

Q Did Al Sutton come back finally?

A We were waiting in the office after we had come back from outside and Meyer Sutton was in the room. Mr. Harary brought Meyer Sutton in the room and Mr. Meyer Sutton and I were discussing the camera

which had previously been offered to me and Mr. Harary had been in and out of the room and at one point he came into the room and said that Al was back and he and Meyer Sutton left the room and shortly thereafter Mr. Harary returned with a brown paper bag and I took some money out of the bag and counted it and counted it to be $1,250.

[39] Q What did you do then?

A After that I had left the premises and was picked up in a vehicle by Inspector Wenig.

MR. PHILLIPS:

May this be marked Government Exhibit 3 for identification.

(Government Exhibit 3 marked for identification.)

MR. PHILLIPS:

May this be marked Government Exhibit 4 for identification.

Q I show you Government Exhibit 3 for identification, Agent Ostrow; are you able to identify that?

A Yes, I am.

Q What is that?

A This is the brown paper bag that Mr. Harary gave me after he came into the office.

Q How are you able to identify that?

A I have my initials on the bag and the date that I initialled it.

Excerpts from Testimony of Lawrence Ostrow - Direct

Q I show you Government Exhibit 4 for identification.

Are you able to identify that?

A Yes, I am.

Q What is that?

A This is the $1250 which Mr. Harary presented to me.

Q How are you able to identify that?

A I have on the bills there the date and my initials [40] on it.

MR. PHILLIPS:

Government offers Government's Exhibits 1, 2, 3 and 4 for identification.

(Government's Exhibits 1, 2, 3 and 4 received in evidence.)

* * * *

[50] CROSS EXAMINATION

BY MR. FAWER:

* * * *

Q Does the word "classify" have a meaning in terms of the Internal Revenue Service?

A Yes, to classify returns for audit.

Excerpts from Testimony of Lawrence Ostrow - Cross

[51] Q When you say classify for audit, will you explain to the jury what you mean?

A Well, to classify a return for audit, returns are received into the District Office, and agents sit down and look at these returns and select these returns for audit based on whether they appear worthy or not from the face of them, and also there's miscellaneous ways of selection of returns.

* * * *

[53] Q Now, I take it that the Sutton & Sutton returns [54] in this case were not classified, is that correct? They didn't go through classification?

A I don't believe so. They may have — I don't think they did.

Q To your knowledge, did they?

A No.

Q Now, there came a time in August of 1970, this last August when you were assigned those returns, were you not?

A Yes.

Q And those returns were assigned to you by whom?

A My group supervisor.

Q And in fact do you now know or did you know in August who had requested that those returns be audited?

A Well, I subsequently found out that Inspector Wenig had requested that audit dividion to have these returns assigned to me.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q You say audited and assigned to you?
A Or to have them assigned to me.
Q But audited and the audit assigned to you?
A To have them audited.
Q Those are two determinations, are they not?

THE COURT:
I don't follow that.
Q The decision to have an audit conducted is a [55] determination, isn't it?
A Yes.
Q That was decided by Agent Wenig, was it not?
A I don't know.
Q Do you now know that he had requested that audit be done?
A He requested the audit division to have the returns assigned to me.

THE COURT:
That does not mean he is the one who made the decision to have it audited?

MR. FAWER:
I didn't say that.

THE COURT:
But you are suggesting it.
Q But he didn't in fact request you to do it, did he?
A He did.
Q Inspector Wenig is with the Inspection Service?

Excerpts from Testimony of Lawrence Ostrow - Cross

A Yes.

Q And that service is concerned with ferreting out corruption among Internal Revenue employees that is one of their functions?

A Yes.

Q And ferreting out those who would seek to corrupt Internal Revenue Agents, is that correct?

A Yes.

[56] Q Who they have information have engaged or are engaging in that type of activity, is that correct?

A I believe so.

Q Now, at the time you were assigned this audit, these returns by your supervisor, that was in early August of 1970?

A Yes it was.

Q All right.

What if any instructions were you given by your supervisor at that point in time?

A None.

Q During that month of August, were you contacted by Inspector Wenig?

A Yes, I was.

Q How soon after the assignment was given you?

A I believe a few days. A couple of days after.

Q And you received a phone call from him?

A Yes.

Q And did he summon you to his office?

A Yes.

Q And did you go?

A Yes.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q Did you have the tax returns at that point in time?

[57] A Yes, I did.

Q And you had already contacted the representative or had contacted the taxpayer?

A The first day I received the returns I called to set up an appointment.

Q Which is an automatic thing you would always do, right?

A Yes.

Q And you then were called back by Charles Harary, weren't you?

A The first day Mr. Mike Sutton said he would have his accountant call me, and I didn't receive a call, so I inquired the next day and he did call me.

Q And he set up an appointment for September 1st?

A Yes, he did.

Q Had you ever heard of Charles Harary before that minute?

A No, I didn't.

Q You saw his name on the return?

A Yes.

Q That was all you knew about him?

A Yes.

Q Had you ever heard of the Suttons before?

A No.

[58] Q Did you then go to see Inspector Wenig?

A Yes.

Q And that is in 26 Federal Plaza, in his office, across the street?

A Yes.

Q Did you have a conversation with him?

A Yes.

Q Tell us what he said to you.

Q Inspector Wenig told me that he had requested the audit division to assign these returns to me and I had them, that he had information that these taxpayers were possibly pay-off people, that he was just alerting me to the fact of any possible overture, any possible attempt of a bribery upon audit of the taxpayer.

Q To your knowledge, up to that point in time, to your knowledge had these taxpayers been involved in any audits with the Federal Government, by the Internal Revenue Service?

A No, not that I know of.

Q Did Inspector Wenig advise you that there had ever been any contact in which there was a suggestion of a bribe up to that point in time, by these taxpayers?

A You mean by the Internal Revenue Service.

Q To the Internal Revenue Service.

[5] A I don't understand —

Q I will rephrase it.

When you had a discussion with Inspector Wenig, did he suggest to you that these taxpayers had ever made any overtures by way of a bribe to any member of the Internal Revenue Service as of that point in time?

A No.

Q And it is a fact, is it not, that as far as you know, there had never been any contact between the taxpayers, their representative and Internal Revenue?

Excerpts from Testimony of Lawrence Ostrow - Cross

A Yes.
Q Is that correct?
A Yes.
Q So if I understand it, he said that he had information that there may possibly be a pay-off?

THE COURT:
No, he didn't say that.

MR. FAWER:
I'm sorry.

THE COURT:
He said they might possibly pay off people.
Q Possibly pay off people?
A Yes.
Q And this is the man, as far as you understand it, who requested the audit be engaged in; Inspector Wenig?
A He made request of the audit division to have it [60] assigned.

* * * *

[61] Q Your audit at that period of time was solely of the organization Sutton & Sutton Ltd., is that correct?
A Yes. And I have to clarify that.
Q Yes?
A That entity plus any other entities I am obligated to go into through that entity. Not just that corporation,

but I am also obligated to look at the individual returns and anything else the taxpayers might be involved in.

Q That would be part of your normal obligation?

A Yes.

Q Regarding an audit?

A Yes.

Q This was not your first time in meeting Inspector Wenig, was it?

A No, it was not.

Q You had —

A The first time that I worked with him or met him.

Q I asked you, is this the first time you ever met him?

A No, it isn't.

Q You had seen him on previous occasions?

[62] A Yes, I have.

Q Did you have occasion to work with him in various kinds of investigations before?

A One other time, yes.

Q Had you had occasion to work with other inspectors, other people in the Inspection Service on prior occasions?

A Yes.

Q And on prior occasions had you been wired with electronic surveillance equipment?

A A few —

Excerpts from Testimony of Lawrence Ostrow - Cross

MR. PHILLIPS:

Objection as irrelevant, your Honor.

THE COURT:

Overruled.

Q You had?

A Yes.

Q How many times had you been involved in such investigations?

A I believe three.

Q And this would be the fourth?

A Well, when you say in such other investigations, you mean where the return has been assigned to an agent in the audit division to have —

THE COURT:

When either Wenig or one of the inspectors there had an audit assigned to you.

THE WITNESS:

Three times, I believe.

* * * *

[71] Q Did you go back and speak to you supervisor after having spoken to Inspector Wenig?

A No.

Q Was your next act with regard to the audit your going to the premises of Sutton & Sutton on September 1st?

A Yes.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

[72] Q By the way, prior to going there on September 1st, you did have occasion to look at the returns?

A Yes; I did.

Q And were there any particular items that you wanted to question when you went there on September 1st?

A I didn't make any notes on particular items. A few of the expenses, T & E, the capitalization I wanted to question. The inventory, which is a standard item that I would look at, the inventory.

* * * *

[73] Q Now, this capital item appeared on the balance sheet portion of the return —

A Yes.

Q And that does not affect as such the income or taxability of the corporation, does it?

A No.

Q And you say this was an item that you noted and were going to question about?

A I didn't write it down anywhere, but I did question it when I looked at it to question the taxpayers on it.

Q Was there anything unusual about the item as it appeared on the return?

A No.

Q It appeared as paid in capital?

A It was broken up into two accounts. One was [74] capital stock, and the other was paid-in capital.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

[75] Q I take it there was nothing unusual at that point in time, prior to your audit, about the size of the initial investment, was there?

A I didn't think of it in the terms that you now mention it.

Q Now, on September 1st, when you went to Sutton & Sutton, Ltd., that's 1204 Broadway; am I correct?

A Yes.

Q You were not wired with any electronic device, were you?

A No; I was not.

Q And I take it that at this point in time you viewed this as a routine audit?

A That's what it was, just an ordinary audit.

* * * *

[79] Q On that morning you finally did get down to doing some work on the audit, did you not?

A Yes, we did.

Q You asked for certain material to be produced, did you not?

A Yes, I did.

Q You asked for returns of the corporation in question, is that correct?

A I had the original returns.

Q Did you ask to see his copies or not?

A No, I don't believe I did.

Q Did you ask for the information concerning the travel and expense items?

A Not initially, no.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q Did you ask for any information concerning the inventory?

A The first part of the morning was spent, I asked for the books and records and I basically just went through the [80] books. I didn't ask for specific items. I basically went through the books of the corporation to correlate any questions I wanted to raise.

Q How about the personal returns of the Suttons? Did you ask for them that morning?

A I asked for copies, yes.

Q And he agreed to produce them?

A Mr. Harary didn't have them. He stated that he would produce them at, subsequently we arranged Friday, that Friday, he would bring them to my office.

Q Was there any other material that you asked him to produce that morning?

A Well, I asked him to produce the, asked him about the substantiation of the $199,000.

Q What did he say to that?

A He explained to me what I said on direct testimony, that the, he said that the taxpayer came from Israel, had to flee and leave a big large amount of money there and they subsequently liquidated their estate and had it sent over. That is what he stated to me.

Q Did he say that they left the money in Israel?

A Well, he stated it was from Israel on our first meeting.

Q Did he say he would supply you with substantiation [81] of the item itself?

A He said that at our next visit he would have ad-

ditional substantiation for me to show what he was telling me.

Q And I take it there was no discussion at that point with regard to the nature of the substantiation?

A There was some, I believe, discussion as to what type of items would be, to show such as cancelled checks, possibly a notarized statement. If the bank had any records of where the funds may have come from, such as unusual checks they sometimes know it.

Q Is it fair to say that at that point in time you had absolutely no knowledge of what kind of substantiation Mr. Harary and/or the Suttons would in fact produce?

A No, I didn't know what they would show me.

Q It was an open item that they were going to prove to you?

A They were going to subsequently substantiate, yes.

Q Just as well as the other items that were open, such as the inventory and the rest?

A Yes.

Q And I take it in the latter part of the morning you decided, you and he decided to go to lunch, did you not?

A It was the early part of the afternoon, I believe, [82] on that day.

Q Excuse me.

And did you and he go to lunch alone?

A Yes.

Q Where did you go to lunch?

Excerpts from Testimony of Lawrence Ostrow - Cross

A I believe it was the Old Garden.

Q Is that right near the place of business of the Suttons?

A The restaurant we went to is right around the corner from where the business is.

Q And did you continue to have a very friendly kind of conversation with him during lunch?

A Yes, we did.

Q By the way, who paid for the lunch?

A Mr. Harary.

Q On prior occasions have taxpayers or representatives paid for your lunch?

A Yes, they have.

Q Have you ever reported that as a bribe?

MR. PHILLIPS:

Objection, your Honor.

THE COURT:

Overruled.

A No, I have not.

Q Is there anything in the regulations of Internal Revenue which permits you to accept the payment of a lunch [83] and not report it as a bribe?

A Yes, there is.

Q What?

A I don't know if it is written down but it is authorized that if a representative offers to pay for your lunch that you can accept that without deeming it to be any kind of gratuity for any favors they may want on an audit.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q Who told you this?

A It is, I believe Special Services told us when they — periodically they give classes in the office to the field groups, stating to them, be aware of overtures and where to report any bribe attempts and also these items such as a lunch.

Q That's all right.

A It is not a bribe attempt.

Q And I take it that it was during this lunch, immediately at the end of it when you concluded eating lunch that Mr. Harary suggested that you walk down the street to see some women who were standing in front of a hotel, is that correct?

A Yes.

Q Did he insist that you go?

A No, he didn't insist.

Q Did you say you don't want to go?

[84] A No, I did not.

Q You went with him?

A Yes, I did.

Q And when you got there, what did he say to you?

A Mr. Harary said in essence, I don't remember his exact words, that the women that he had spoken about were not there and as we walked on, he stated that if I ever wanted the services of a prostitute, just to let him know, because he could arrange it and also that he would pick up the tab.

Q Did you say to Mr. Harary at that point in time, don't even suggest something like that to me?

A No, I did not.

Q You're a Revenue Agent, are you not?

Excerpts from Testimony of Lawrence Ostrow - Cross

A Yes, I am.

Q Did you say "Let's get back to work, I don't want to even entertain that thought"?

A No, I did not.

Q You just listened to him and declined his offer?

A Yes, I did.

* * * *

[85] Q Did you at that point in time immediately go back to work or did you keep walking with Mr. Harary?

A We walked around the corner and then back to the premises of the taxpayer. We took a walk back. We didn't go directly back, we went around another way, just up the block and back instead of directly back.

* * * *

Q You finally did get back to your audit that afternoon, did you not?

A Yes, I did.

Q And tell us what you did the rest of that afternoon?

A That afternoon I looked at some of the items I had questioned and made some notes on them.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

[86] Q By the way, how much time did you actually spend on the audit in the morning?

A The actual time in the morning was —

THE COURT:

What time did you get there?

THE WITNESS:

I got there close to ten. I believe Mr. Harary came about 10 or 15 after ten and we must have started maybe at 10:30, 20 to 11:00 and broke about a quarter [87] to ten — quarter to twelve. About an hour and 15 minutes of work.

Q And how about in the afternoon?

A About two and a half hours.

Q And what did you do during these two and a half hours?

A Most of the time was in discussion of various items.

Q Various income items?

A The questions that Mr. Harary, the question of inventory, the question of the capitalization which he told me.

Q I thought he told you that in the morning?

A He did.

Q And he was going to produce substantiation?

A Right, but it took about, well, it wasn't real long but it was about 15, 20 minutes of discussion on it.

Q In the morning?

A Yes, and possibly 25, yes, it was.

Q We are now in the afternoon?

Excerpts from Testimony of Lawrence Ostrow - Cross

A We are now in the afternoon?

Q Yes. In the afternoon.

A In the afternoon, going back, I looked at the books, made a few notes and I believe I possibly looked at some of [88] the entertainment, asked him for a few of the items that they brought up some bills. I believe I looked at some of the purchases.

* * * *

[89] Q And is it fair to say that what you looked at that afternoon you were satisfied with, there was no problem?

A Yes.

Q Now, did you request any other items to be turned over to you or delivered to you the next time you met?

A Yes, I did.

Q What were they?

A Copies of the individual returns, the inventory, copies of any other entities which the taxpayers may have.

Q When you say copies of any other entities, you mean copies of the tax returns of any other entities?

A Yes.

Q Mr. Harary advised you, did he not, that there were such entities?

A Yes.

Q He told you there were some six other stores?

A I don't recall the number he told me but he told [90] me there were others.

Q Did he describe them to you?

Excerpts from Testimony of Lawrence Ostrow - Cross

A I don't recall if he described them.

Q Did you ask him?

A I don't recall.

Q And there came a point in time, I take it, when you realized you were not going to be able to finish that day, is that correct?

A Well, it was definite we knew we wouldn't finish because I would have to see copies and these various other items, the inventory, would have to do more work on the premises, yes.

Q It was about what time that you decided you would call it a day?

A Around 4 o'clock we decided to call it a day.

Q At that point what occurred?

A Four o'clock as I was getting ready to leave, we had discussed the various items we would need for the next meeting, we decided we would meet Friday, he would come to my office to bring the various documents, copies, not the substantiation, just the copies of the returns. He would only drop them off in my office.

Q You had asked that he do this, had you not?

A No, I believe he said he would bring them Friday.

[91] Q Which would give you an extra --

A I asked him possibly he can mail them to me if he wanted to but I believe he said he would drop them off, he would be in the area.

Q And that would be September 4th that he would drop them off, is that correct?

A That Friday. The 1st — I am not sure what day the 1st was, so that would be the Friday.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q The 4th was a Friday.

A Then —

Q Excuse me. You had —

A Shall I finish the question or not?

Q I'm sorry. Go right ahead.

A And then Mr. Harary asked if I wanted to have a drink and at first I said no and then he said, come on, let's have a drink, and so I said all right. And as we left the premises, he picked up this brown paper bag which was sitting at the door and we walked to the Old Garden and that's where he gave me the camera, said I should take it.

Q Have you finished?

A Yes.

Q This is the same man who but three hours earlier had offered you a prostitute?

* * * *

[92] A Yes, it is.

Q Did you ever say to him, "I don't want to have a drink with you, I want to go home"?

A My training isn't to say that.

Q Did you say it to him?

A No, I did not.

* * * *

[93] Q That was a man who had offered you, according to your testimony, a prostitute, correct?

A Yes, he did.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q And you are under an obligation, as you stated, to go back and report that, is that correct?

A Yes, I should.

Q But you chose, did you not, Mr. Ostrow, to go with him to have a drink as well?

A Yes, I did.

Q Which I assume he paid for, correct?

A Well, he had insisted that I go and and after, after the first time, he said, "Come on, let's go, let's go" so I stated, "all right."

Q Tremendous pressure on you go for that drink?

A Not extreme.

Q Any pressure?

A A little.

Q What kind?

A "Come on, let's go."

* * * *

[94] He was referring to you as Larry by this time?

A Yes, he referred to me as Larry.

Q And you called him Charlie?

A I don't recall. I know when I phoned him that Friday to cancel the appointment, I called him Charlie but during that audit, I don't know if I called him Charlie. I may have called him Mr. Harary or I may have called him Charlie a few times, I don't recall.

Q But it was a friendly kind of conversation over a drink?

A Yes.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q Isn't it a fact that he offered to give you this [95] camera at wholesale price?

A He offered to give it to me for $15 which he stated was his cost.

Q And in fact he mentioned giving it to you, offering you the camera in the morning at a wholesale price, had he not?

A During the conversation he didn't mention giving me the camera in the morning. He stated that as we were discussing cameras, he stated that he knew someone in the camera line and maybe he could get me a camera.

Q Did you say to him, "Don't even suggest such a thought"?

A I indicated he didn't have to.

Q Excuse me?

A I indicated no. I said "That's all right."

Q You declined the offer at that point?

A Yes.

Q This is before the offer of the prostitute in the afternoon?

A Yes. Well, it wasn't an offer of a camera. It was an offer that he knew someone in the line of cameras and maybe he could get me a camera reasonably and I said, "That's okay."

Q Do you draw a distinction between that and the [96] offer of a camera?

A Yes, I draw a distinction between them, yes.

Q Would you report the offer of a camera to you at wholesale?

Excerpts from Testimony of Lawrence Ostrow - Cross

A Would I report that? No, I would not.

* * * *

[97] Q When did you then contact Inspector Wenig?

A The next, following morning.

Q Was there anyone but Inspector Wenig that you contacted concerning the audit at this point in time?

A Concerning the audit? You mean the overrule?

Q Audit, overrule whatever you want to describe it as.

A I just contacted Inspector Wenig regarding the overture.

Q You didn't discuss the audit with anyone else did you?

A I did not.

Q So the only conversation you had with anyone from Internal Revenue was concerning the overture and that was with Inspector Wenig?

A Yes.

[98] Q And you then told him about being offered a prostitute and declining said offer?

A Yes, I did.

Q And about the camera in the afternoon?

A Yes, I did.

Q And what did Inspector Wenig say to you at that point in time?

A At that point, Inspector Wenig took an affidavit as to what I had told him to get my statement on it.

Excerpts from Testimony of Lawrence Ostrow - Cross

He took an affidavit and also I had told him that I had the appointment for Friday and the following, the 22nd and at that time he told me to cancel the appointment for Friday.

[99] Q And that was the sum total of your conversation with Inspector Wenig at that point?

A Yes. I believe I may have mentioned the one item of the $199,000.

Q And did he say anything to you about it?

A No.

Q Did you tell Inspector Wenig anything about the conduct of the audit itself as opposed to the overture?

A I don't understand your question.

Q Did you discuss with him how your audit was progressing, aside from this one mention of the capitalization?

A No. Only, possibly I have other items, I have to go back for other items I mean.

Q Was that it?

A Yes. I didn't discuss the audit with him at all.

Q Did you in fact attempt to cancel your appointment with Mr. Harary for September 4th?

A As I previously stated, yes.

Q And, by the way, this was September 2nd?

A This was the following day.

Q And you called Mr. Harary?

A I called him that afternoon, yes.

[100] Q Right from Inspector Wenig's office; right?

A Yes.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

[101] Q Now, between September 2nd and September 22nd, I take it you had no further contact with Mr. Harary or the Suttons; is that correct?

A Yes.

[102] Q And I take it at that point in time you had no reason for seeking any further material concerning the audit, because it was to be produced by the taxpayer's representative; is that correct?

A Yes.

Q And you did not seek any further material; is that correct?

A No; I did not.

Q And at that point in time, the capitalization item stood on no different footing than any other item that was not yet substantiated; am I correct?

A Yes.

* * * *

Q At that point in time you did not know what particular kind of documentation they would give you with regard to the substantiation of the capitalization; is that correct?

A Yes; it is,

* * * *

[104] Q At that point in time, between September 2nd and September 22nd, you were again summoned to Inspector Wenig's office, were you not?

A Yes; I was.

Q And at that point Inspector Wenig gave you certain documents, did he not?

A Yes; he did.

* * * *

[105] Q And he handed you at that point the individual tax returns of the Suttons, didn't he?

A Yes; he did.

Q These were the very returns you felt it was not necessary for you to requisition at that point in time; is that correct?

A Not that I felt. That I just didn't requisition.

Q And you were conducting the audit?

A Yes.

Q On your own?

A Yes.

Q With no directions from him?

A Yes.

Q And he handed you the individual tax returns?

A Yes.

Q Did you discuss the individual tax returns with [106] him?

A No.

Q He just handed them to you?

A He just said, "Here's the individual returns", and gave them to me, and I looked at it.

Q Did you say, "What do I need them for? I have already asked the taxpayers for them"?

A No.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

[107] Now, you again saw Agent Wenig prior to September 22nd, did you not?

A Yes; I did.

Q He summoned you to his office again?

THE COURT:

You mean, after this —

MR. FAWER:

After this, your Honor.

[108] THE COURT:

When you saw him on September 2nd —

THE WITNESS:

On September 2nd.

THE COURT:

You saw him at a time when he gave you the individual tax returns?

THE WITNESS:

Yes.

THE COURT:

And you went to him a third time before September 22nd?

THE WITNESS:

Prior to the appointment, I was summoned for a briefing..

Excerpts from Testimony of Lawrence Ostrow - Cross

THE COURT:
Was that prior to September 22nd?

THE COURT:
Prior to September 22nd.

THE COURT:
All right.
Q Was that that morning or a day or so before?
A I don't recall exactly when it was. Possibly a few days defore.

THE COURT:
But it wasn't the 22nd?

THE WITNESS:
No; it wasn the 22nd.

THE COURT:
All right.
Q This was the third time you had seen him in the interim?
A Yes.
Q He called you to his office?
A Yes.
Q And you had a conversation at that time?
[109] A Yes.
Q He gave you certain instructions at that time?
A Yes.
Q He called you to his office?
A Yes.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q And had a conversation at that time?
A Yes.

* * * *

[110] Q Agent Ostrow, is it not a fact that Inspector Wenig told you that you were to treat the September 22nd meeting as if it was your first meeting?
A Yes; he did.
Q Is it not a fact he told you not to broach or suggest a bribe in any way?
A Yes.
Q That is what he instructed you?
A He stated that, to treat it as a normal audit, that this was as though it was the first time I was going out, do my work; there's nothing special about the audit other than I'm going to be wired, and the taxpayer previously made an overture. If they're going to make it again, they'll make it again.
Q They?
A Well, whoever made it. The accountant had made it at this time.
Q And you were to do nothing to lead them on; [111] is that correct?
A Just to conduct the audit, as I normally would.

* * * *

[112] Q Agent Ostrow, then, on the day of September 22nd you again saw Inspector Wenig did you not?
A Yes.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q You went to his office and you were searched?

A Yes.

Q And at that point the electronic surveillance, the eavesdropping device was placed on your body?

A Yes.

Q And you were given another device as well to carry in a briefcase?

A Yes.

Q And you were told to keep that with you?

A No.

Q Were you told to take it with you to the audit?

A I was given the briefcase with the device in it, and I knew it was there. I wasn't told anything specific about it, but "This is a device."

Q And where was the one on your body? Where was it?

A It was right under my tie.

Q That is where the speaker was?

A The microphone.

[113] Q The microphone. Excuse me. And how did you get over to 1204 Broadway?

A I was driven over by Inspector Wenig and other inspectors.

* * * *

[116] Q Now, on September 22nd, you arrived at about what time.

Q And Mr. Harary arrived about what time?

A Possibly about fifteen after ten.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

[118] Q Now Mr. Harary arrives at ten-fifteen, and I take it you begin by having some more personal conversation with him?

A Yes.

Q There was no question, at this point it was "Charlie" and "Larry", wasn't it?

A I believe I called him "Charlie". I'm not sure.

Q And he called you "Larry"?

A Yes. I believe so.

Q And you discussed your personal affairs somewhat with him?

A I don't recall.

[119] Q Well —

A I possibly may have. I may have discussed my child. That's right. I believe I did, now. The baby was colicky, or it was at a cranky age.

Q And he told you about his children?

A He may have. I don't recall.

Q Now I take it you discussed the Jordanian crisis?

A I believe so.

Q In fact, you discussed the situation in the Middle East generally, did you not?

A I believe so.

Q And you discussed the problem of violence in New York City, did you not?

A I don't recall that. We may have.

Q And I take it you did come down to the point where you began the audit?

A Yes.

Q And at that point he did produce everything that he said he was going to produce, did he not?

A Yes.

Q He produced the tax returns for the other entities?

A Yes.

[120] Q He produced the individual tax returns for the taxpayers?

A Yes.

Q All three, by the way: Meyer and Abraham, and the third one was Ovadia?

A Yes.

Q You had all three of those?

A Yes.

Q He produced the material with regard to the inventory item?

A Yes.

Q And he produced the substantiation that the taxpayer was offering with respect to the capital item of $199,000?

A Yes.

Q I take it after having produced these various documents, the first thing that was then really discussed was the substantiation of the capital item; is that correct?

A I don't recall. I may have looked at the other returns before I got into the substantiation. I believe I did look at a few other things.

* * * *

[121] Q Well, I take it a part of the morning dealt with the capitalization?

Excerpts from Testimony of Lawrence Ostrow - Cross

A Yes.

Q And you got into that question, right?

A Yes.

Q And he offered you three letters?

A I don't recall the number. I believe it was three.

Q And there was also a card, a business card, was there not?

[122] A There may have been. I don't recall.

Q Do you have a recollection of a card, right now?

A Not other than you mentioned before, a card. I don't recall.

Q When you say "before", you mean in a prior proceeding in this case?

A Yes.

Q And did you at that time recall there was a card?

A You mentioned it, and there may have been, but I couldn't definitely say there was a card.

Q And these three letters: You examined them, did you not?

A I read them over.

Q And I think you indicated on direct examination the first of these letters was a letter dated several years prior to 1970, is that correct. or several years prior to the date that the money went into the corporation; is that correct?

A I believe so.

* * * *

[123] Q I take it the money went into the corporation some time in the summer or August of 1967; is that correct?

Excerpts from Testimony of Lawrence Ostrow - Cross

A Somewhere around there in — it was listed here on the return, the long period return. It wasn't listed in the short-period. I would have to look at my work papers to see the exact dates between it. I made a note of it.

MR. FAWER:

The witness is examining Defendant's Exhibit A for identification.

A (Continuing) Yes. The $99,000 went in on August 29, 1967, and the $100,000 went in on 3/6, 3/7 varying dates of 1968.

THE COURT:

The $99,000 went in on what —

THE WITNESS:

August 29th of 1967.

Q I take it that came off from the books and records of the corporation?

A This was from the books, right.

THE COURT:

And the $100,000 at various times [124] subsequent?

THE WITNESS:

In March, yes.

THE COURT:

Go ahead.

Q By the way, Mr. Ostrow, I take it that the $100,000

was not an opening capitalization. It was in fact paid-in capital, some six months after the operation?

A They termed it "paid-in capital".

Q Which is what paid-in capital is: investments made during the course of the corporation, is it not?

A It's a technical term, depending on whether the corporation was active, how active it was, if they didn't need the money then. You might call it capital instead of paid-in capital.

Q In either case, it would not have a bearing on its income or its taxable effect, would it?

A Not to the corporation, no.

Q Just before we deal with these letters, the $199,000 which appeared on the balance sheet phase of these corporate tax returns would not in any way affect the taxation on that corporation, would it?

A No.

Q And the only person it could effect were the people who paid that money into the corporation; is that [125] accurate?

A Yes.

Q Is it not a fact that the letter, the first letter that was shown to you was a letter dated several years prior to the August '67 date?

A I saw three at once. I believe the first one I read was an earlier dated letter. I don't know the exact date.

THE COURT:

Well, would it be 1955?

Excerpts from Testimony of Lawrence Ostrow - Cross

THE WITNESS:

No. It wasn't that early. It was around in the '60s.

Q And that letter reflected, did it not, that a man by the name of Elia —

A I don't recall the name.

Q Does that name have any recollection to you? Elia?

A No.

Q That he was attempting to liquidate the estate of the Suttons' father, Hillel Sutton, his estate in Syria?

A I recall that one of the letters —

THE COURT:

Wait a minute. One of the letters? I thought you were concentrating on the first letter.

MR. FAWER:

I am, your Honor.

[126] THE COURT:

All right.

A (Continuing) I don't know what the substance of the first letter was. There were three letters, your Honor, and I read them all, but I can't verify to which letter stated what.

THE COURT:

All right.

Q I take it you did not make a single note about what appeared on any letter?

Excerpts from Testimony of Lawrence Ostrow - Cross

A At that point it wasn't necessary.

Q Did you ever make a note of what appeared on any letter?

A I never got to the point where I would have to.

Q But you didn't make it?

A No.

Q Now, you recall that the early letter referred to the attempts to liquidate the estate of Hillel Sutton?

A Yes.

Q And that the letter reflected that this man was having difficulty liquidating that estate?

A The basis of all the letters were that, yes. I believe the first one read, which was an earlier dated, just mentioned the statements, the story of fleeing from Syria, that there was a large estate, and the second letter I read I believe said —

[127] Q Let's stay with the first, if you will pardon me.

Q I can't distinguish between the first, second and third.

Q Perhaps I can refresh your recollection.

You recall that that letter also indicated that this man who was attempting to liquidate or help in the liquidation of the estate had to leave the country from which he was writing himself?

A He may have.

Q And he was writing, was he not, from Beirut, Lebanon?

A I don't recall.

Q Do you recall discussing Beirut at all?

A Yes.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q You know that Beirut is in Lebanon?

A I believe it is, yes.

Q Do you recall the second letter, it was signed by a man named Jack Nasser? I think you referred to him before.

A I recall the name Jack Nasser, yes.

Q And do you recall his having stated in the letter that he, too, was now seeking to liquidate the estate in Syria?

A I believe one of the letters state that, yes.

[128] Q Do you recall that the letter indicated that Mr. Nasser indicated tha it was very expensive to accomplish this purpose?

A One of the letters did indicate that, yes.

Q And that finally, the third letter, which was also from Mr. Nasser indicated that he had been successful through other people in liquidating that estate?

MR. PHILLIPS

Objection. I don't know if it's been established the third letter was from Mr. Nasser.

MR. FAWER:

I am asking.

THE COURT:

Ask him.

Q Was the third letter also from Mr. Nasser?

A I don't recall how many letters were from him.

Q You have no recollection about that?

A No. I know there were three letters and Jack

Excerpts from Testimony of Lawrence Ostrow - Cross

Nasser, the name sounds familiar as one of the letters, possibly, but I don't recall if two or three were from him or how many were from him.

Q Do you recall that third letter saying that whoever had written it, stated that he had been able to finally liquidate the estate?

A Yes, I recall something to that effect.

Q That he had been able to do this at great expense?

A I believe it said something like that.

[129] Q And that what was left of the estate was approximately $200,000?

A I believe so.

Q And that you recall the letter stated they were forwarding or making preparations to forward the money?

A I am not sure of that part.

Q Was there anything in the letters about the money being forwarded?

A There may have been. I don't recall them exactly. If I could see the letter, I am sure I would remember.

Q If I had them, you would see them.

Do you recall this card, was this the card of Jack Nasser?

A I don't recall it.

Q Do you recall being shown a card which reflected that Jack Nasser was the consul to the Republic of Philippines, but located in Jerusalem, Israel?

A I know that the taxpayers and I discussed something about a consulate, whether an individual was

or it may have been Jack Nasser, consulate from Israel or of Israel but I don't recall the card.

Q At that point in time, I take it you knew that the money had, the money in question, the $199,000 capitalization had been deposited into the corporate bank accounts [130] in the forms of checks, did you not?

A Yes, I was told that it had come in by check.

Q Did you see the bank account?

A Yes, I did.

Q And the books reflect this, did it not?

A Yes.

Q And you then, is it not a fact, questioned Mr. Harary about this substantiation?

A Yes, I did.

Q And did he not tell you this was all he knew about the entire transaction?

A He stated that the taxpayer would know more. He didn't state what limits his knowledge had but he did state that the taxpayer would know more about it and we brought him in.

Q It was at this point in time or just prior to this point in time, was it not, that you told Mr. Harary that you had called the Israel Consulate to check about money coming out of Israel?

A I believe it was around then, yes.

* * * *

Q Did you call the Israeli Consulate?

[131] A No.

Q Did you tell him you called?

Excerpts from Testimony of Lawrence Ostrow - Cross

A Yes, I did.

Q Did you tell him that you had called and found out that money could not be taken out of Israel without a record being made of it?

A Yes.

Q Now I take it at that point in time you thought because of what Mr. Harary had told you at the first meeting, that the money had physically come from Israel, right?

A Mr. Harary stated that it came from Israel.

Q That he thought it had come from Israel?

A I believe he stated that id did come from Israel. I can't recall his exact wording. I don't believe he said he thought. I believe he said that it did come from Israel. The exact words I don't know.

Q It was on that basis that you told him that you had called the Israeli Consulate to see if money could come out?

Q It was on that basis that you told him that you had called the Israeli Consulate to see if money could come out?

A Because he had previously told me Israel, yes.

Q And in fact, these letters indicated that the money had come out of Syria or Lebanon?

A Yes.

* * * * .

[132] Q Did you have a purpose in telling Mr. Harary that you had called the Israeli Consulate to deter-

mine the validity of whether money could come out of Israel? Did you have a purpose?

A Purpose? I just told him what was a fact that if the money came out of Israel, a way to substantiate this would be with the Defense Minister's receipt because people coming out of, bringing anything out of Israel, get a receipt from the Defense Minister which states what they brought out.

Q But you never called to know whether you had to go through the Defense Ministry?

A I never called but was told this.

Q Who told you this?

A Well, as I previously was stating, when I had first reported to Inspector Wenig of the bribe attempt, I mentioned to him about the $199,000 as an unusual item because I previously once had a case something similar to this type of item. This type of explanation of where money had come from, and when I had come to look at the individual return, he stated to me that based on what I had said about Israel, [133] he checked on this, with the Israeli Consulate, and they stated that the Defense Minister issues a paper of what is brought out of Israel and therefore this is one way of checking an item.

Q When did he tell you this?

A When I went over to see him with the individual return.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

[136] Q And he told you that he learned that to get money out of israel, you must get the clearance of the Foreign Defense Ministry, is that correct?

A You get a receipt from them, I believe he said.

Q For the exportation of currency and so forth?

A What was brought out, what was left. I don't know the exact mechanisms.

Q And it was on this basis that you then told Mr. Harary on September 22nd, that you had called the Israeli Consulate to check it?

A Yes.

Q Now, at that point in time, Mr. Hajary had exhibited to you these letters and the card, and did you question him any further concerning this capital item?

A I believe I explained to Mr. Harary that what he had presented wasn't good because anybody, — not in [137] those words — but anybody could write these letters, they could date them any date they want and say anything they wanted in order to substantiate the item. Something more definite would be required such as cancelled checks or various items of this nature.

Q And it is a fact, is it not, at that point, he said, "This is all the information I have; for any other information you will have to talk to one of the Suttons"?

A I don't recall if he said this is all he had — "this is all I have." He did say this, that one of the Suttons —

Q And he brought Meyer Sutton into the room?

A Yes.

Q And at that point Meyer Sutton undertook to explain the situation to you?

Excerpts from Testimony of Lawrence Ostrow - Cross

A Yes.

Q And it is a fact, is it not, that Meyer Sutton explained to you that he and his father and mother and his family had to emigrate from Syria to Israel because they were Jews, am I correct?

A Yes.

Q And that in fleeing they had to leave this rather large estate in Syria?

A Yes.

[138] Q And that they had since that time been making efforts to being out whatever money they could salvage from this estate?

A Yes.

Q And in fact they finally were able to effect this through Jack Nasser, who was able to pay a large sum of money to Arabs in Syria and/or Lebanon and who in turn were able to get out $200,000?

MR. PHILLIPS:

Objection, your Honor.

THE COURT:

Overruled.

Is that what he told you?

THE WITNESS:

I don't recall him saying Jack Nasser, who he paid it to, but he reiterated what the letter stated, that large sums were paid, that they wouldn't get the full estate and it was transmitted out by Arabs, yes.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

Q I take it he was explaining to you, was he not, that [139] it was Arabs in Syria who had in fact transmitted the money?

A I believe so. I couldn't say exactly Arabs in Syria but I know he did say Arabs had transmitted it out.

* * * *

Q By the way, have you ever, Agent Ostrow, made any attempt to check out Jack Nasser?

A No, I did not.

Q Never?

A No.

Q Have you ever made any attempt through the government to check out the name that appeared on the first letter?

A No reason to.

Q Yes or no?

A The name that appeared on the first letter?

Q The writer of the first letter, of the earlier letter?

A No.

* * * *

[140] Q There is no question there was a name on that letter when you saw it?

A I believe there was, yes.

Q At that point in time, Mr. Sutton explained to you the difficulty, did he not, of getting substantiation from Arabs still living in Arab countries?

A Yes.

Q And you stated to him that you were very aware of the situation?

A I don't recall. I may have.

Q And at that point in time, he asked you what kind of proof could he give you to substantiate this item in view of the problem?

A I recall him asking that.

Q Proof, right, correct?

A What? Well, he said numerous times, like I testified before, he would say, "What type of items can I show?" Numerous times he said, "What can I do, what can I give to you to make the item good." He said various things like this and then I would reiterate the different types of substantiation that were required.

Q When he said, "What can I do," you had no doubt [141] that he was talking, as you interpreted it at that point in time, as documentary proof, did you not?

A I don't know what he was — I assumed he was talking to documentary proof. When it became repetitious, I wondered if he was trying to ask me for something, but, you know, to state something.

Q And you told him what kind — what did you tell him was the kind of proof he needed?

A Any item which he could get to show how the money was transmitted and I listed notarized statements from individuals, cancelled checks and any item which he could show.

Q You asked for the cancelled check from Syria, is that correct?

Excerpts from Testimony of Lawrence Ostrow - Cross

A Well, the monies had been transmitted by check, so therefore, the cancelled check, wherever it was from.

Q And you asked for an affidavit from the Arab who had transmitted it?

A Yes.

Q And in fact you then asked, did you not, for perhaps the bank in which it was deposited here in New York, Recordak, the deposit slip?

A Yes.

Q They gave you a copy of the deposit slip, did they [142] not?

A Yes.

Q And I take it you wanted to see that to see if perhaps the code or the name of the bank on which the check was drawn was reflected on the deposit slip?

A I stated to the taxpayer this may be a way of showing that the money came in by a foreign source and he suggested to look at the deposit tickets and I said yes, in fact, I believe I suggested it earlier, that the deposit tickets would be a source prior to Mr. Sutton suggesting it.

Q And he showed you the deposit slip?

A Yes.

Q And I take it that that information was not contained on the deposit slip?

A No, it wasn't.

Q I take it you also suggested their going to see if there was a Recordak made of the check itself at the Bankers Trust here in New York?

A Yes.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q Is that correct?

A Yes.

Q And what did they respond about that?

A I don't recall.

I believe they may have stated that they didn't thing that the bank did it. Your know, Mr. Harary [143] constantly said the bank wouldn't do it, wouldn't do it and I stated that it would help to ask them, because if they had it, it would help to substantiate the item.

Q Do you recall that when you were inquiring, when you stated that you wanted an affidavit from the person who transmitted or arranged for its transmission, that Mr. Sutton replied that that could not be obtained because it would mean death to the person who transmitted it because he was in Arabia, helping a Jew?

A Mr. Sutton stated it would be difficult and very hard to obtain. I don't recall if he said that it would be impossible. He may have.

Q Did he say it would endanger the life of the person who did it?

A I believe he stated that.

* * * *

Q You stated that at that point, did you not, Mr. Ostrow, that the reason you were so interested in this item was because you now were aware that the other entities that they had, these other discount stores, did a cash business, is that correct?

At some point in our conversation in the morn-

ing, [144] I stated to the taxpayer that once after I had seen the copies of the businesses that there were, these were cash businesses, and because of the nature of the cash business, the question now of substantiation is a little stronger than if they were not cash businesses.

Q There was nothing wrong as I understand it, nothing improper in doing a cash business, but you were saying that this lent — made it more important that you check out the $199,000?

A Not more important. It did put more emphasis on the question.

* * * *

Q Is it not a fact that your interest in the $199,000 was seeing whether or not it really should have been tax exempt or in effect represented unreported income from other entities?

A Yes.

Q And I take it if there were unreported income from [145] the other entities, namely the six discount stores, that there are ways for Internal Revenue to actually check those stores to determine whether such improper conduct is going on?

* * * *

A Yes, there are ways when an audit is being conducted. There are tests that can be made to try to verify if the sales are properly reported.

Q So that if in fact there were unreported sales from the other stores, there were ways for Internal Revenue

to directly ascertain that fact in the course of audits of the other stores?

A There are tests.

* * * *

[146] Q I take it no such audits have ever been conducted?

A I don't believe so. To the best of my knowledge, they have not.

Q Is it not a fact that after telling him, telling Mr. Sutton about the fact that since he had other businesses which did a cash business, it became important to substantiate the $199,000, that you said that if he can't resolve [147] this, "I'll have to tax the $199,000 among the three of you," namely the three Suttons?

A I recall stating to the Suttons at one point in my conversation that, as I testified on direct, the question that I would have to tax the individuals as owners of the corporation if I couldn't properly substantiate the item. But where I said it, I dont' recall. I mean in what, what preceded it. I don't recall what Mr. Sutton said.

THE COURT:

Was it in the morning?

THE WITNESS:

Yes, it was.

THE COURT:

Of the 22nd?

Excerpts from Testimony of Lawrence Ostrow - Cross

THE WITNESS:

Yes.

Q Mr. Sutton had asked you what proof you wanted, what proof he could supply you with, did he not?

A I don't recall his exact words but he wanted to know what would make the item good.

Q Did he ask you what proof?

A I don't recall him using those words.

Q Was it not at that point that you asked to see if they could get a hold of, to find out whether the bank had made a photocopy of the check?

A It came up during the morning conversation. I don't know at what point but it was discussed that the bank [148] may have Recordak in which they take a picture of unusual checks.

Q Did they agree to try to do that?

A I believe Mr. Sutton stated he would try to do that.

* * * *

Q Did you not then say to them that you must be — you must be able to trace the funds and that it was necessary for them to get a statement that on such a date a check was mailed from such a place by such a person?

A Sometime during our conversation I stated that I would have to be able to trace the flow of the funds from [149] their source to the, into the corporation, yes.

Q And do you recall Mr. Sutton in response saying

to you that the person who transmitted the funds could not do this because if he did, he would be killed?

A I don't recall if it came then or where it came but he did at some point mention that, he did mention that the people who transmitted the funds had their lives in danger, yes.

Q You recall that you then indicated that even if he produced the notarized statement and even if he produced the check as well, that this still would not necessarily mean that the item was adequately substantiated?

A I explained to Mr. Sutton that morning that he would have to gather all his facts so that they could be looked at together and then decide it. These things, these mere, a notarized statement and possibly one check might not make the whole item good. Maybe this one amount would be good.

Q I am talking about the $199,000. You asked him to produce a notarized statement from the man who transmitted it, that he did in fact transmit it, am I correct?

A I stated this would help him, yes.

Q And you also asked him to get a copy of the check that was actually transmitted?

[150] A It was more than one check, though.

Q Or checks.

A Yes.

Q Did you not then tell him at a point in time that even if he produced both those documents, or I shouldn't say both those documents —

Excerpts from Testimony of Lawrence Ostrow - Cross

THE COURT:

All of those documents —

Q — all of those documents, thank you, your Honor — that that still wouldn't be adequate substantiation from your point of view?

A I don't recall if I said something to that effect or may have been other discussion. There may — I believe I did tell him at times that some items would not, by themselves, be proper substantiation.

* * * *

THE COURT:

Did you ever tell Meyer Sutton that if he got all the documentation you had referred to, to wit, a notarized statement, as of September 1970, plus the cancelled checks, plural, covering the $199,000, that such documentation would not be considered by you as substantiation of the capitalization?

[151] THE WITNESS:

I don't recall stating that.

THE COURT:

Did you ever tell that to him?

THE WITNESS:

Not directly.

THE COURT:

Then how did you tell it to him indirectly?

Excerpts from Testimony of Lawrence Ostrow - Cross

THE WITNESS:

I may have said that just by getting documents that I am saying by themselves do not mean that the item is good. I would have to look at what you are presenting and then make my determination. I can't say by getting this document or that document it is going to be good but I would have to look at what he was giving to me and then make my determination.

* * * *

[152] Q Is it not a fact, Mr. Ostrow, that you said to Mr. Sutton, these things I am giving you are one or two things that are not going to say it is good?

THE COURT:

Before you do that, let's know what you are reading from.

MR. FAWER:

It is Exhibit 3505A, page 48, your Honor.

THE COURT:

This is 3504, is it not?

MR. FAWER:

It is the large one, your Honor.

THE COURT:

That is 3504, not A.

Excerpts from Testimony of Lawrence Ostrow - Cross

MR. FAWER:

Sorry, your Honor.

THE COURT:

Now I have to tell the jury something.

You heard an awful lot about transcripts of recordings. I have refused the government's offer to put these in evidence even though they are a transcript agreed upon by counsel for both sides for the simple reason that there [153] are many inaudible remarks or sounds on that transcript so that the transcript is not a complete document and in my opinion, unless it was complete so that you would know everything that was said, it would be possible for portions that were heard and were able to be transcribe, could be misconstrued because they follow sombody else's statement and one has to be read with the other.

Consequently I have excluded the transcript of this conversation or conversations since they were in the morning, lunch time and afternoon.

However, to the extent that counsel have agreed that there are portions that are audible and complete, the counsel examining, Mr. Fawer, may ask the witness whether he made such statements and, of course, the witness would have an opportunity then or on redirect by Mr. Phillips to explain the background of such statements that followed what is called an "inaudible."

Now, if I can clear it for you, if Mr. Harary is speaking and is saying "inaudible" and we don't know whether he said one word or ten lines and it just says "inaudible" and then there comes something stated by

Excerpts from Testimony of Lawrence Ostrow - Cross

Mr. Ostrow whether he said such but, of course, there could be an explanation of what that means against the background [153a] of what Mr. Harary said immediately before.

It is because of the incompleteness, as I just indicated to you, that I have not allowed the complete transcript in evidence.

* * * *

(Recess.)

* * * *

[161] Q Do you recall Mr. Sutton then saying to you that he is going to attempt to get you the proof you want and "That all he asks you to do is to operate with him as much as possible."

Do you recall him saying that?

MR. PHILLIPS:

Objection. It's confusing.

THE COURT:

I have no idea of this. You have got some quotes and some unquotes. I don't know what you are putting.

MR. FAWER:

I will put it directly in quotes.

Excerpts from Testimony of Lawrence Ostrow - Cross

THE COURT:
Pardon me. If you are referring to a direct quote, come show the witness what you are talking about.

MR. FAWER:
It's in front of him.

THE COURT:
You have it in front of you?

THE WITNESS:
Yes.

MR. FAWER:
It's immediately the next statement by Mr. Sutton.

THE COURT:
You read it. Read it to yourself.
[162] Have you read it?

THE WITNESS:
Yes.

THE COURT:
Did Mr. Sutton ever say to you, "I tell you we going to get you all that you want and we want to ask you to cooperate as much with us because it's a very delicate point where you know certain things that are — "Did he ever say that?

Excerpts from Testimony of Lawrence Ostrow - Cross

THE WITNESS:

Yes, I believe he did.

Q Do you recall your response?

A I believe I acknowledged the point that he had stated it was a delicate point.

Q What did you say?

THE COURT:

What did you say to him?

A I said, "I see it is, I see it is."

Q At that point in time you then excused yourself to go to the men's room?

* * * *

[163] A Yes, I did go to the men's room.

Q And you left Mr. Harary, I take it, and Mr. Sutton alone in the room?

A Yes.

Q Do you recall that upon your return there was continued discussion about the capitalization item?

A I believe so.

Q Do you recall that the tenor of their appeal shifted at that point in time, of Mr. Sutton's appeal shifted at that time?

A I don't recall the appeal shifting. Over all appeal was constantly what he could get to — what he could get or what he could do to make the item good and he did shift to a religious ground and he did speak about religious grounds but I can't definitely

say whether there was a big shift from one appeal to another.

Q You did recall though, at some point in time, he did appeal to the fact that you and they were all Jewish?

[164] A Yes, he did.

Q And he did make an appeal to you on that basis, am I correct?

A Yes, he did.

Q Do you recall him saying to you, asking you, as a Jew to help him out?

A Yes, he did.

* * * *

[165] Q Do you recall Mr. Sutton saying this:

[166] "Exactly. It's not only that in here we can deposit checks in Bankers Trust. You know how we have to take a look at, as you said, it's up to you, really, to consider all the facts and to come to any decisions that —"

Then by you, "MR. OSTROW: Well, I have to make a decision based on —"

And then Mr. Sutton again, "Right, but we ask you, giving you all the facts, we ask you, you know, as a —"

And then Mr. Harary, "As a brother."

And then by Mr. Sutton, "No, as a gentleman, as a Jew, also, as a Jew more than anything, if you are not a Jew you do not know what a Jew is."

Excerpts from Testimony of Lawrence Ostrow - Cross

That's what I am referring to.

* * * *

Q Do you recall that exchange of conversation or that statement?

A I recall him appealing to me on the religious [167] ground and it isn't very clear in my mind. I believe that this was said there and I answered them as usual that even though I am a Jew I still have my job to perform, which is stated right there, in the next sentence.

Q That's right, and do you recall subsequently, on the same page, stating — withdrawn.

You came back to the question of whether or not the bank had made a recordak of the check. Do you recall having any further discussion about that?

A He may have. It was brought up numerous times where I suggested to the taxpayer that one of the ways in which he may help to substantiate with the item was to check with the bank to see if they take pictures of the foreign checks, because I have had experience where banks do take pictures of foreign checks or any documents that are unusual, to protect theirselves.

Q Do you recall stating with regard to that question that if the bank didn't make any recordak of the check deposited, that "We are right back where we started from?"

A I may have stated that to the taxpayer, yes.

Q Do you recall emphasizing again about the fact

Excerpts from Testimony of Lawrence Ostrow - Cross

that if they could not substantiate it, you would have to tax them approximately $60,000 on the $200,000?

MR. PHILLIPS:
Objection. It's repetition.

[168] THE COURT:
You mean a second time in the morning?

MR. FAWER:
Yes.

THE COURT:
Did you tell them that twice in the morning?

THE WITNESS:
I believe I did twice. When I don't recall but I did say it twice.

Q Do you recall Mr. Sutton explaining to you again about the difficulty of getting any substantiation from Arabs in Syria?

THE COURT:
You mean the third time?

MR. FAWER:
Yes.

THE COURT:
That morning?

Excerpts from Testimony of Lawrence Ostrow - Cross

MR. FAWER:

Yes.

A I don't recall how many times. It was more than one time, I believe. I don't recall the exact number.

Q Do you recall saying to them when they were explaining to you about the danger to the lives of those of whom you are asking for substantiation, that you said, "So it puts you in a position"?

A I don't recall only those words at that point. I know I did mention to the taxpayer that he was in a position where it's up to him to substantiate the item; that the burden is on him and not the government to show that the item is a good item.

[169] Q I direct your attention to page 54 of that document, the lower portion of that page.

Do you recall Mr. Sutton saying, "You see, with Syria, not only that Israel is certain not even to be shot," and then by you, "So it puts you in a position," quote unquote?

MR. PHILLIPS:

Objection, your Honor. This is not refreshing the witness' recollection because it does not need to be and, secondly, it's not contradictory.

THE COURT:

Objection sustained.

Q You do recall using the phrase, "So it puts you in a position"?

Excerpts from Testimony of Lawrence Ostrow - Cross

THE COURT:

He answered that question.

Q Up to that point in time, Mr. Ostrow, it is a fact, is it not, that there was not a single suggestion of payment to you of any form of compensation?

A Not this morning, no.

Q That's what I am referring to. We are only directing our attention to the morning.

A Yes.

Q Did you not at that point in time state what the various alternatives were that were being suggested to you — withdrawn.

Did you not at that point in time summarize the various ways in which you could — which they were suggest- [170] ing you could possibly handle this problem of the $199,000?

A At some point I did.

THE COURT:

Did he summarize what Harary and the Suttons were telling him about how he should handle the $199,000?

MR. FAWER:

Yes, your Honor.

THE COURT:

Did you, in the morning?

THE WITNESS:

I believe that the other time we were together —

Excerpts from Testimony of Lawrence Ostrow - Cross

THE COURT:
No. In the morning.

THE WITNESS:
In the morning? I don't recall. I know at some point I did explain to them that or me to accept the item, he knows —

* * * *

A At some point in the day, I mentioned to the taxpayers that one way that the item is good is through substantiation and what they are suggesting is that I just accept the item and say that its good even though I thought that it wasn't by the substantiation they had shown.

Q Just to clarify something, Mr. Ostrow, the discussion of capitalization with Meyer Sutton was only in the morning, am I right? On the 22nd?

[171] A Yes.

Q So we can't be talking of the afternoon, can we?

A Well, I discussed it with Mr. Harary for —

Q But if Sutton was present, it could only be in the morning?

THE COURT:
That's true.

A Yes, I believe so.

THE COURT:
But that wasn't your question.

Excerpts from Testimony of Lawrence Ostrow - Cross

MR. FAWER:

I know. I am just trying to point out —

Q We are talking about the morning, are we not?

A Yes.

Q And you did say to them, did you not, that one way of dealing with it was for them to produce whatever substantiation was available that they could come up with?

A Yes.

Q And you would evaluate it and make a decision based on all the facts?

A Yes.

Q And that the other possibility they were suggesting was for you to say that you were satisfied without them coming up with any further substantiation, is that correct?

A Yes.

Q Did you not say that with regard to that second [172] item, that second alternative, that would put you out on a limb?

A Directly after they made their statement?

Q No. When you said it. Not when they said it. When you were summarizing.

THE COURT:

Do you understand the question?

THE WITNESS:

Yes.

A I don't recall if it was directly after that statement. That some time during the morning I stated

to the taxpayers, when they had asked me to lie a bout the item, which they did — they came out and I believe Mr. Harary said, "Lie about it," and Mr. Sutton said, "Don't even talk about it; it's taxes" — I did state at a point that it put me out on a limb to do something like that. They are asking me to do something improper.

Q And you said this on several occasions to them, did you not?

A I said it two or three times during the morning.

Q Did you say to them at all, "Don't even suggest something improper"?

A No.

Q You said it puts you out on a limb?

A At various times in the morning, yes.

Q Do you recall at this point in time, and you sum- [173] marized it and said it would put you out on a limb, what Meyer Sutton's response was?

A I don't recall if I said it at this point that you are referring to.

THE COURT:

He said some time in the morning when you used the phrase that this puts you out on a limb, that any time that you used that phrase, do you recall what Meyer Sutton responded?

MR. PHILLIPS:

I just think Mr. Fawer should pinpoint what time he refers to.

Excerpts from Testimony of Lawrence Ostrow - Cross

THE COURT:

He asks him does he remember. He can say "I don't remember."

Do you remember?

THE WITNESS:

He made a few responses. I don't recall what they are.

THE COURT:

Now, Mr. Fawer, come up here and show the witness the page.

Q I am directing your attention to page 55. I direct your attention to your statement in the middle of the page which I questioned you about with regard to the summary of what were the alternatives and then your statement that it puts you out on a limb. Do you see that?

* * * *

[175] THE COURT:

What did he say? This is to refresh your recollection as to what he said. Will you read it?

All right. You have read it. Does it refresh your recollection as to what he said?

THE WITNESS:

Yes, it does.

Excerpts from Testimony of Lawrence Ostrow - Cross

THE COURT:
Now what did he say?

THE WITNESS:
Mr. Sutton in essence said he didn't want me to say something that wasn't so but yet he wanted me to accept what he had shown me and he said no one could blame me for accepting it and I stated that —
Q I just asked you—

MR. PHILLIPS:
Objection.

THE COURT:
He only asked what Sutton said. That was all he was asked.
Q He said he did not want you to say you verified something if you had not, am I correct?
A Right.
Q He said what he did want you to do, that what he was asking you to do was accept what he had presented to you and describe that to your supervisors?
A No. He was asking me to accept it and say that it [176] was good and explain it to my supervisors in that manner but yet, I couldn't.
Q If you had done that, could your supervisors reject your conclusion?
A I couldn't even do that.

THE COURT:
That isn't the question.

Excerpts from Testimony of Lawrence Ostrow - Cross

Supposing you told your supervisors that the Suttons could not substantiate the capital figure of $100,000 because they claimed they got the money from Arabs in Syria or Lebanon and they couldn't either get an affidavit from them or they couldn't get back the cancelled checks.

* * * *

THE COURT:

If you told that to your supervisors as a basis for okaying the tax return, could your supervisors overrule you and say that's not a substantiation that you could accept?

THE WITNESS:

Yes, they could.

Q Up to that point in time, Mr. Sutton had not suggested giving you anything of value, am I correct?

A No, he had not.

* * * *

[177] Q Do you recall again saying to do that would put you out on a limb?

A I don't, I don't recall it. I don't see it here, that I stated it directly after —

Q Your second statement on the top of page 56, does that refresh your recollection?

Excerpts from Testimony of Lawrence Ostrow - Cross

MR. PHILLIPS:

Objection. The witness has stated three times he has made the statement —

* * * *

[179] THE COURT:

That's another place where you said this would be —

THE WITNESS:

This is another one.

THE COURT:

Okay. Next question.

Q And again, Mr. Sutton then appealed to your religious instincts and said, "Help us out because we are Jews," did he not?

* * * *

[180] Q "Give us the best chance possible," and appeal to your religious instincts, saying "We are all Jews"?

A Yes, I believe he did.

Q Did you again respond, perhaps not with regard to that precise statement, but did you again say, "I am putting myself, I am extending myself on a limb to do this"?

A I'll have to see. I don't recall the direction it followed unless —

Excerpts from Testimony of Lawrence Ostrow - Cross

MR. PHILLIPS:
Objection, your Honor.

THE COURT:
The witness says he doesn't recall such a response to that.
Q Do you recall the following colloquy with Mr. Sutton in the middle of page 56:
"Exactly but, listen here, help us out because Arab countries, because we are Jews and —
"MR. OSTROW: You keep saying that, okay. You want me to help you out but, like I say, helping you out is saying something that isn't so.
"MR. SUTTON: No, but, uh —
"MR. OSTROW: And then I am putting myself I am extending myself over on the limb"?

THE COURT:
All right. There it is. Did you say [181] it again at that point?

THE WITNESS:
Yes, at that point I said it again.

THE COURT:
Yes, he did.
Q Mr. Ostrow, did you think of cutting off this line of conversation at that point?
A It would be unjust to the taxpayer to stop him from presenting his case as far as substantiating the item.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q You had told him what you needed from him, had you not?

A Yes.

Q The only thing left was for him to produce documentation, was it not?

A Unless he wanted to present something else verbally to try to explain the situation.

Q Was there anything verbal that he could say to you that you think of then or can think of now that would satisfy you in terms of substantiation?

A I don't know what he could have said.

* * * *

[182] Q At this point in time, did not Mr. Sutton suggest that instead of accepting it as a substantiated item that you just not refer to it at all in your report?

A I believe at one point he said, "Just don't mention it" — in effect, accept it.

* * * *

[183] THE WITNESS:

I did state to you before, I believe, your Honor, that Mr. Sutton did say to me that to forget the item. I don't remember his exact words. I stated before I don't remember the exact words, but they did tell me to forget the item.

THE COURT:

To forget any question of capitalization?

Excerpts from Testimony of Lawrence Ostrow - Cross

THE WITNESS:
Yes. . . .

* * * *

[184] Q Mr. Ostrow, do you recall saying, "Yeah, but no okay. Well, we'll think about it but' — and then interrupted — and then Mr. Sutton saying, "Exactly", and then your saying "Well, of course, that's the only other than saying that the item is good and uh, that's it"?

THE COURT:
Keep on going.
Q (Continuing) "OSTROW: As long as the item is [185] good, then there is no problem."
Do you recall that conversation?
A I don't recall the specific one. I mean, not in mind, in point of time Mr. Sutton sitting across from me, but a conversation such as this when I explained what was needed, that transpired, yes.

* * * *

Q Do you recall, Mr. Ostrow, Mr. Sutton then said, "I hope that, hope that, hope you can convince you that the item is good and the whole thing", and your response, . . .

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

[186] THE COURT:

Go ahead, Mr. Fawer.

Q "You know, I mean we can sit down with what we have and uh, work it out. That's all I mean as long as we can see that it's a good item then there is no problem."

* * * *

[187] Q Do you recall, again, that morning, coming back and saying that "If we can't resolve the problem', that you are obligated to go into their personal tax returns?

A Twice I said it, yes. I mean, obligated. I thought you meant that I would have to tax them. From the taxpayer, that this was an item that would affect their individual returns, yes.

* * * *

[206] MR. FAWER:

I don't think we covered a point —

Q Mr. Ostrow, with regard to the $199,000, if it had come in from an estate, if in fact it had been part of an estate and the money had come in from abroad, as the Suttons contended, I take it it would have been tax exempt, would it not?

[207] A It's possible that it would have.

Q And that is really what the issue was: whether it was tax exempt or not?

A Yes; it was.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q And one other point. I don't think we touched on it yesterday.

In fact, did they not tell you that Mr. Nasser, who handled the negotiations for them, ostensibly pursuant to the letters, that he had acted as the intermediary?

MR. PHILLIPS:

Objection, your Honor. It is hearsay.

THE COURT:

True.

Q Is that what they told you?

MR. PHILLIPS:

Objection.

THE COURT:

The Suttons?

MR. FAWER:

Yes. The Suttons.

THE COURT:

I will take what the Suttons said.

A I believe they may have mentioned that he wasn't the actual person who transmitted the funds, that it was done by other people, other than this Mr. Nasser.

Q How much time in the morning did you spend on the audit of September 22nd?

Excerpts from Testimony of Lawrence Ostrow - Cross

A Well, we began working possibly around ten-thirty, and we broke for lunch close to one, so about [208] two and a half hours.

* * * *

[209] Q There came a point in time after the discussions which you testified yesterday, when you, I think, once again advised the Suttons that if you could not resolve the issue of the substantiation of the capital item, you would have to go into their personal returns. Do you recall that?

A I believe I said that to them, yes.

* * * *

[210] Q And Mike Sutton left the room? At a point in time Mike Sutton left the room, did he not?

A Yes; he did.

Q And at that point did you and Mr. Harary turn your attention to other phases of the audit which you were making?

A I believe we did when Mike was in the room, also.

Q And you paid attention to other phases of the audit?

A Yes.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

Q You had made clear the kind of substantiation you needed, had you not?

A I had done that throughout the whole morning.

Q That is my point. And you then went on to these other areas of the audit?

A Yes.

* * * *

[211] Q And then there came a point in time when you agreed to go to lunch?

A Yes.

Q With Mr. Harary?

A We went with Mr Harary and Mr. Sutton.

Q And you went to the same restaurant —

THE COURT:

Which Sutton?

THE WITNESS:

Mike Sutton.

[212] Q And during the course of lunch you had much general conversation; am I correct?

A Yes.

* * * *

[215] Q Now, by the way, I take it you didn't pick up the tab for lunch again; am I correct?

A No, I did not.

Q Mr. Harary or Mr. Sutton picked it up?

Excerpts from Testimony of Lawrence Ostrow - Cross

A I believe it was Mr. Sutton.

Q And you then returned to the office to continue your audit; am I correct?

A Yes; I did.

Q And you and Mr. Harary came into the room yourselves to continue the work; is that accurate?

[216] A Yes. We went into the office we had been in before.

Q Mr. Sutton was not there?

A No; he wasn't.

Q And am I accurate that initially I believe you excused yourself, and you went to the men's room?

A I may have, yes. I believe I did.

Q And then you returned; am I right?

A Yes.

[217] Q Now, at that point in time, up to that point in time the ball was in their park to produce the substantiation, was it not?

MR. PHILLIPS:

Objection as to the form, your Honor.

THE COURT:

Sustained.

Q It was up to them to produce substantiation, am I correct?

A Yes.

Q There was nothing further for you to do with regard to the capital item, capitalization item, until they produced or failed to produce documentation?

A Right.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q And you had made perfectly clear the kind of substantiation you needed?

A Yes.

Q I take it, Mr. Ostrow, if at that point in time you had left the Suttons' premises, had just folded up your tent —

MR. PHILLIPS:

Objection to form, your Honor.

THE COURT:

Well, I'll take it as a colloquialism.

Q You understand what I mean by folding up your tent?

A Leaving.

[218] Q Exactly. There would have been nothing to report back to Inspector Wenig of a criminal nature, am I correct?

A Yes.

* * * *

Q Is it not a fact that upon your returning to the room where Mr. Harary was, you then said that you, Mr. Ostrow, initiated the conversation with regard to the capital item once again and enumerated that which you had made perfectly clear already in the morning, namely, that substantiation in the form of checks and a notarized statement was required?

Excerpts from Testimony of Lawrence Ostrow - Cross

MR. PHILLIPS:
Objection to the form, your Honor.

THE COURT:
Overruled.
A No, I did not.

[219] THE COURT:
Did you initiate the conversation?

THE WITNESS:
No, I did not initiate the conversation.
Q Did Mr. Harary?
A Yes, he did. I believe he did.
Q Do you recall testifying on a prior occasion with regard to this issue?
A Yes, I do.
Q What was your testimony?

THE COURT:
What do you mean, what was his testimony? Regarding what?

MR. PHILLIPS:
Objection.
Q Who initiated the conversation?

MR. PHILLIPS:
Objection, your Honor.

Excerpts from Testimony of Lawrence Ostrow - Cross

THE COURT:

Overruled.

A I believe I stated then that what you had stated about mentioning the items of substantiation, that I did mention them again and it appeared there that I may have started the conversation but upon thinking about it, I now know that I did not start the conversation, that Mr. Harary did start the conversation.

Q Do you recall on your prior testimony saying:

"I couldn't say definitely that it was Mr. Harary who started it"?

* * * *

[220] Q Did you not then state — let me get the testimony — did you not then state to Mr. Harary:

"Right, so we still have the other question I thought we would resolve today but I guess", and then inaudible by Mr. Harary and you continued:

"Well, I guess you have to show me, give me some correlation to that. Well, if you can pinpoint the person, et cetera, so on and so forth, a notarized statement to show, you know, like the money from John Jones in Syria and John Jones goes to a notary public and notarizes that I, John Jones —"

Do you recall making that statement?

* * * *

[222] A I believe the first point above, after, just before I said "right," Mr. Harary initiated what we had left to do.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

A Where Mr. Harary initiated the conversation on what was left.

Q You had other things besides the capital item left, did you not?

A Yes.

Q And isn't it a fact that that is what he enumerated, the other items left to do that afternoon?

A No, it is not.

Q But you did then state what I just read, did you [223] not, after he said that?

A Then I stated that we still have the other question that I felt we would resolve today, which I previously stated, I believe.

* * * *

[224] Q And you then did tell him again about the notarized statement and about getting the check from Syria?

A Previous to telling him that, there is another portion here which is inaudible here and Mr. Harary again asked me what do you want; in other words, he asked me, I don't know his exact words, but he did ask, "What type of items?"

* * * *

[226] Q Directing your attention to the middle of the page — we are focusing it on that — did you not make a statement describing again the kind of documentation that you wanted; namely, a notarized state-

ment from someone from Syria that he had transmitted the money, et cetera?

A Yes.

Q And do you recall Mr. Harary's response to that?

A Yes. It is not on here because it is inaudible.

Q It is what?

THE COURT:

Do you recall?

THE WITNESS:

Do I recall his response?

MR. FAWER:

Yes.

* * * *

A His response was just the various items. He stated — I more or less repeated what I had said, an affidavit, the [227] various items.

Q And isn't it a fact that he said, "In other words, like an affidavit"?

A His statement is there. There may have been more. I believe there may have been additional statements on here.

Q And it is not a fact that you then said, "From the third party with the check that they sent with a copy of the check or the check"?

Didn't you say that?

A Yes, I did.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q And didn't Mr. Harary then say to you "A copy we might get from the bank"?

Didn't he say that?

A Yes, he stated that and also —

Q At that point in time —

A At that point he stated it and he also said something else.

Q What else?

A That is where he made his initial offer.

Q That is where he made his initial offer?

A Yes, it is.

Q Isn't it a fact that you twice, prior to his making any offer, said "What do you want me to do?"

A No, it is not.

* * * *

[228] Q Do you recall in the prior proceeding being asked the following questions and giving the following [229] answers:

MR. FAWER:

Page 254, your Honor.

Q "Q What do you want me to do?

"You said that again?

"A Yes.

"Q That is the second time you asked him that?

"A Yes. That second time was prior to the bribe."

Do you recall being asked those questions and giving that response?

A I don't recall. I recall the questioning about it

Excerpts from Testimony of Lawrence Ostrow - Cross

— "So what do you want me to do" but I don't recall giving the response that it was prior to, because I believe as it went, I wasn't sure of what the first "So what do you want me to do" was, and there was some question about that. But I definitely stated that there was an offer just prior to the second "So what do you want me to do."

The offer was prior to the "So what do you want me to do" the seond time. There was an offer there.

Q Isn't it accurate that you testified in the prior proceeding that you recall that your response to the offer was the statement "So what do you want me to do"?

A Yes.

* * * *

[230] Q And that you also testified that on to occasions you used that same phrase prior to the bribe being offered?

A No. I don't —

MR. FAWER:

I offer that portion of the transcript in evidence, your Honor.

THE COURT:

Now, wait a second. There is no doubt, is there — show it to him.

MR. FAWER:

Yes, your Honor.

Excerpts from Testimony of Lawrence Ostrow - Cross

THE WITNESS:

Yes. The second time was prior to the bribe. Therefore, the taxpayer made a bribe, and I said, "So what do you want me to do?" And that's what I stated. So where is the problem?

A It was said twice before the bribe; is that accurate?

A It was not. The bribe was prior to the "So what do you want me to do?"

THE COURT:

Where is that?

MR. FAWER:

Line 12, your Honor.

[231] THE WITNESS:

Because the bribe was first, and then there was, "What do you want me to do?"

THE COURT:

All right.

You are now saying that this is in error?

THE WITNESS:

I definitely —

THE COURT:

— that you twice said, "So what do you want me to do?" before the initial offer? Am I putting that in context for you?

Excerpts from Testimony of Lawrence Ostrow - Cross

THE WITNESS:

That's not right, what you have just stated. That the "So what do you want me to do" came before the second offer is not right.

THE COURT:

So the testimony that you gave in the first proceeding is not correct?

THE WITNESS:

Either I misunderstood the question, your Honor, or it's transcribed wrong. I just —

THE COURT:

You admit the transcript is an accurate transcript?

MR. PHILLIPS:

Yes, your Honor.

THE WITNESS:

Then apparently I misunderstood the question and got the "prior" to "subsequent" reversed.

* * * *

Q In any event, you did say, after Mr. Harary said, [232] "A copy we might get from the bank" — you did say, "So what do you want me to do?"

Excerpts from Testimony of Lawrence Ostrow - Cross

MR. PHILLIPS:
Objection, your Honor. He has answered that question.

THE COURT:
He has.

MR. PHILLIPS:
And that is not what he said, furthermore.

THE COURT:
Go ahead, Mr. Fawer.

MR. FAWER:
I would like to go on.
Q Is that the point that you did say it the first time?
A Yes. This is the point.

* * * *

[233] Q There are three places, are there not, on the transcript where you say, "So what do you want me to do"?
A Yes; there are. Two —
Q Yes or no?
A Yes. There are three.
Q All right.
Now, let us proceed with the question.
A Yes.
Q Do you recall Mr. Harary, in response to your

statement, "So what do you want me to do", saying, "The [234] Suttons will give you an affidavit"?

A Mr. —

Q I am asking if you recall that.

A No. I don't — I don't recall it.

Q Do you recall that you made a response, "I have to be able to tie it in. Just an affidavit without seeing any money passing one way or the other, it doesn't mean anything?"

MR. PHILLIPS:

Your Honor, I object because of the inaudible that preceded that and the inaudible that comes after that.

MR. FAWER:

Exactly. And what I asked with regard to the inaudible is, did Mr. Harary say, "We will get you an affidavit by the Suttons", to which you responded as I just read it?

THE WITNESS:

Did he?

A In other words, would the Suttons give an affidavit to that effect?

Q Isn't that what Mr. Harary suggested as a form of substantiation, that they would give you a sworn affidavit?

A I don't recall if it was there. At some point he did state that, and I believe it came out that it would be self-serving, an affidavit from the taxpayers, be-

cause [235] that's their own statement, which they had previously told me.

Q And isn't what you were referring to when you said, "Just an affidavit without seeing any money passing one way or the other, it doesn't mean anything"?

A I don't recall if it was that. This affidavit or one from an individual abroad, without seeing the checks.

Q Well, you wanted the affidavit from abroad?

A I did want the affidavit from abroad, definitely.

* * * *

[236] THE COURT:

Just sitting here, can you recall what he said before you said to him, "I have been able to tie it in; just an affidavit without seeing any money passing one way or the other, it doesn't mean anything"?

THE WITNESS:

No, I don't recall that.

THE COURT:

All right. He doesn't recall.

Q You do admit making that statement, though, about the affidavit, do you not?

A The statement that your Honor just read?

Q Yes.

A Yes.

Q Do you recall Mr. Harary stating as you were in this conversation, "Get a letter from the bank to satisfy you"?

Excerpts from Testimony of Lawrence Ostrow - Cross

A I believe he mentioned that, yes, he did mention [237] that, "Get a letter from the bank," which had been mentioned before during the morning.

Q You recall him saying that?

A Yes

MR. PHILLIPS:

Objection, your Honor. Mr. Fawer again is jumping around and it's confusing.

THE COURT:

No. He is going down to the next statement.

MR. PHILLIPS:

But the impression is left that it went right directly.

MR. FAWER:

I specifically said it was not.

THE COURT:

He didn't.

MR. PHILLIPS:

All right.

THE COURT:

There are four or five give and takes in between.

Q At any time, Mr. Ostrow, in my cross-examination, that you wish to add anything you are free to do so.

Do you recall your response to Mr. Harary's statement, "Get a letter from the bank to satisfy you"?

Excerpts from Testimony of Lawrence Ostrow - Cross

In the middle of the page, if you need it.

A The response was, I said something, "I can't do it," and something was inaudible.

THE COURT:

Do you recall what that inaudible was?

[238] THE WITNESS:

No, I do not, your Yonor.

* * * *

THE COURT:

He said no, Mr. Fawer. Go on.

Q There is, then, an inaudible by Mr. Harary. You said, "That's", which was apparently interrupted, another inaudible by Mr. Harary and did you not then say [239] again, "What do you want me to do"?

A Yes, I did.

Q That's the seond time you said it?

A Yes, it is.

Q Did not Mr. Harary then make the suggestion about an affidavit from abroad, the self-serving papers that you referred to previously?

A Yes, he did.

Q Did you not say then, "Is that what you want me to say? Okay, keeping talking"?

A Well, I was responding to Mr. Harary's inaudible of an offer. That is where the other offer was made, where Mr. Harary stated, "Maybe we can compensate you with some women or money" and then I said, "So

what do you want me to do", and then Mr. Harary proceeded to tell me what he wanted me to do, "I want you to —" and then there is inaudibles and he mentioned — there are a lot of inaudibles in it but basically it was to accept the papers, to say the item was good and I said to Mr. Harary, "Is that what you want me to do? Okay, keep talking; is there anything else you want me to do."

Q Do I understand correctly that you are saying this is the second bribe offer?

A Yes.

[240] Q And between the two, Mr. Harary is still suggesting various forms of substantiation?

A I believe I mentioned it on direct. I am not sure but after the first attempt was made, the conversation just went on, on to the various items and there wasn't specific talk about what would be done, either Mr. Harary didn't respond to my "So what do you want me to do" but he did make an offer and I responded, asking him what he wanted me to do and then we just discussed various items of substantiation and then he made the offer again and then he specifically told me what he wanted done.

Q So I understand it, after making the offer, he was still talking to you about giving you a substantiation?

A Right, I believe he may have interrupted my sentence or I may have interrupted his sentence and he just continued talking.

Q Do you recall that you then continued in a conversation with Mr. Harary, did you not?

Excerpts from Testimony of Lawrence Ostrow - Cross

A Yes.

Q Do you recall at a given point that Mr. Harary said, "I am just talking about" and then there is an inaudible — on the top of page 3 — "I am just [241] talking about," and then there is an inaudible at that point, the amount, and he said, "The amount of tax due on the $200,000"?

A No.

Q You don't recall him saying that?

A No, I —

* * * *

Q Do you recall that you then said, "Well, you reached compensation"?

A Yes.

Q And that Mr. Harary then said, "I have not mentioned any money"?

A He did not.

Q He did not say that?

A No, he did not.

Q Then did you not then say after "I can," an inaudible, "Keep talking"?

A Mr. Harary —

[242] THE COURT:

Wait a second.

Do you recall what was in that inaudible?

THE WITNESS:

The exact words of this inaudible, I can't recall, as

numerous other inaudibles throughout this part of the conversation —

THE COURT:

That's right. Half of it is inaudible.

A But once the offer was made, as I stated previously, my instructions were that I could try and increase the offer if I thought it was low or just increase it to possibly show the taxpayer that I wouldn't accept just any little offer for what Mr. Harary was asking me to do. He was asking me to do something which would save quite a bit of tax so I, at various points, said, "Keep talking," to let him do it and I also mentioned "You made the offer and you keep talking" and he would keep talking or I would mention the amount of money that was involved, such as the $60,000 in order to try and get him to raise his offer, which he subsequently did.

Q Okay?

A Yes.

Q You then said something inaudible and did not Harary say something inaudible and then, "I wanted them to talk to you"?

[243] A Yes, he did.

Q Meaning the Suttons, did he not?

A I believe — well, I know at this point he stated that he had wanted them to make the offer to me.

Q Was Mr. Harary somewhat distraught at this point?

A I don't believe he was. He was a little nervous, not so much at this time, more so a little later after,

when he questioned me whether, you know, it was okay —

THE COURT:

The question is, was he distraught at this point.

THE WITNESS:

No.

THE COURT:

Next question.

Q Was he jovial?

A No.

Q Was it not your response at that point, "Well, they were in here, they didn't talk"?

A I stated, "Well, they were in there, they didn't talk".

Q Do you recall as the conversation progressed your saying, after there was an inaudible in the middle of the page, "You have to look in what you are dealing with and then you go on from there; you think about it"?

Do you recall saying that?

[244] A I stated before I said something like that.

Q I am asking you now?

A Yes, I did.

Q Do you recall there is an inaudible by Mr. Harary and your saying "Are you going or are you stopping"?

A Yes.

Q Do you recall as you continued you saying to Mr. Harary, "Say something, talk, you talk, talk"?

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

A Not the way you said it but I did say it.

Q How did you say it?

A "Say something —" well, I have to say there is inaudible above where —

Q Tell us what you said. Excuse me, Mr. Ostrow.

[245] THE COURT:

Excuse me. Mr. Fawer.

Do you know what Mr. Harary said which is reflected here as being inaudible which calls for your statement?

THE WITNESS:

Not the specific inaudible but a number of them are not reflected here. Mr. Harary would come out and say, "How much do you want," and as I stated I would respond by not giving an amount, by saying an item such as "Say something, you talk, talk," and I did state that and —

Q And then there is inaudible, is there not, by Mr. Harary?

A Yes, there is.

Q And is it not a fact that immediately thereafter you said, "What do you want me to do"?

THE COURT:

No. It says, "When do you want me to do."

Q Was it "When or "What do you want me to do"?

A It was "What do you want me to do."

Q And you said, "What do you want me to do"?

A Correct.

Excerpts from Testimony of Lawrence Ostrow - Cross

Q And is it not a fact that the statement, "What do you want me to" was, as you recalled it the first thing you said after the bribe was offered?

[246] A No, it was not. This was just another, "What do you want me to do," as we were bickering about the price.

Q Is it your testimony that your recollection is that the first thing you said after the bribe was offered was the statement, "What do you want me to do"?

MR. PHILLIPS:

Objection.

A Yes.

MR. PHILLIPS:

He has answered that.

THE COURT:

It's back on page 1.

MR. FAWER:

He answered it.

Q Is it not a fact that your statement at that point. "What do you want me to do," which had come right after your statement, "Say something, talk, you talk, talk," it's at that point that Mr. Harary offered you the money in question?

A No.

Q Again at the top of the next page you again impressed upon him the amount of tax that was involved here, 25, 99, $60,000 in taxes, is that correct?

Excerpts from Testimony of Lawrence Ostrow - Cross

A We hadn't decided on the amount yet.

Q I am talking about taxes, not about an amount.

A Well, yes, I did say that.

Q When did you come up with those figures, 25, 99 [247] 60,000 in taxes?

A I did not say 25, 99. I don't know what the 25, 99 were at the time. There was a calculator in the room and I was pushing some numbers and I can't say exactly why it was stated, but I did state it.

Q No recollection?

A No. I know I had mentioned the 60,000 previously as taxes.

Q Was Mr. Harary a little distraught at this point?

A Excuse me. I think I may have been trying to give an estimate of what the taxes may have been because we calculated based on percentages of the amount.

Q And the spread was between 25 and 99,000?

A No, I don't, like I say, I don't remember the exact reasoning of it.

Q At that point there was negotiation of a bribe, was there not, that afternoon? A negotiation of an amount?

A Yes, there was.

Q It was resolved at $1,250?

A Yes, it was.

Q Mr. Harary left the room?

A Yes, he did.

Q And he came back and he told you that he had [248] spoken to the Suttons and Al Sutton was going to get the money, did he not?

Excerpts from Testimony of Lawrence Ostrow - Cross

A He came back and I asked Mr. Harary if he had the money.

He stated that Al Sutton was going to get it.

Q Then you were waiting around for the money, is that correct?

A Yes, we were.

[249] Q And he also told you something else. did he not, at that point? You had more conversation?

A We had more conversation. I don't know what —

Q I'm sorry —

A I don't know what you are referring to.

Q Didn't he even tell you that for putting his neck on the line he had even asked for an extra $750 from the taxpayer?

A I asked Mr. Harary what he had asked for from the taxpayer and he did not tell me because as I testified on my direct examination, when we reached $750, Mr. Harary stated that he would ask the taxpayers for a thousand keep 250 himself and give me 750, so naturally, when he came back in, I asked him how much he had asked them for and he didn't mention it.

Q Did you ask him initially "What are you getting out of it?"

A No, I did not.

Q Did you ask "Are you going to keep anything?"

A I did not. He raised that during the — as the prices were going up and he reached 750 — he stated "I'll ask them for a thousand and I'll give you 750

and keep 250 for myself." That is where that type of discussion initially came up.

* * * *

[252] Q I take it, by the way, that up to this point in time Mr. Harary had not as yet even negotiated what you were going to do for this amount of money?

MR. PHILLIPS:

It is not clear which point in time.

Q While you were waiting, after you had agreed on the amount of money, that at no point up to then had there been agreement as to what you were to do for this sum of money?

A Yes, there was an agreement as to what we would do.

[253] I would do what Mr. Harary wanted but we didn't have it down to specifics, such as no change versus a small disallowance, so during the conversation, I asked him what do you specifically want me to do.

Q And I am saying to you, asking you, Mr. Ostrow, is that the negotiation of what you were to do, as to quid pro quo, was not tied down until after the bribe had been agreed upon; is that accurate?

A I don't understand your question.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

THE COURT:

Generally he says, he was supposed to give a clean bill of health. Specifically as to how he was to achieve that, no.

Q Would a small disallowance be a clean bill of health?

A If that is what the taxpayer wanted. If he feels it is a clean bill of health to pay a little tax, it is a clean bill of health.

Q What I am saying, you had not agreed upon what precisely you were going to do with regard to your report of this audit, is that accurate?

A Yes.

[254] Q And then you did agree while you were waiting for the money to arrive, is that accurate?

A Yes.

* * * *

[255] Q Do you recall while you were waiting saying to Mr. Harary, "Charlie, why did you wait so long to ask me?"

A I believe at one point I had said that to him, yes.

THE COURT:

Now, wait. When you say at one point, is that after he left the room and came back and told you it is all set, "Here is your $1250; you are going to get $1250"?

Excerpts from Testimony of Lawrence Ostrow - Cross

THE WITNESS:
I don't recall the time. I believe it was after he had left the room. I questioned him —

THE COURT:
And he came back?

THE WITNESS:
Because of the camera incident and the prostitute, I had asked him why he waited so long.

THE COURT:
All right.
Q You said that?
A Yes.

* * * *

[257] Q Didn't you say "I mean you know, if you asked me before and" — then it stops — were you not saying that if he asked you before, you would have been receptive?

MR. PHILLIPS:
Objection, your Honor.
[258] A No.

THE COURT:
Overruled.

* * * *

Excerpts from Testimony of Lawrence Ostrow - Cross

Q And you said, did you not, "Something stopped you."

Do you remember saying that to Charles Harary?

MR. PHILLIPS:

Objection again for the same reasons, your Honor.

THE COURT:

Sustained.

MR. FAWER:

I beg your pardon, your Honor.

THE COURT:

It is incomplete. It is in the middle of a sentence. It stops.

[259] MR. FAWER:

I want to know if he said it and he is free to explain anything he wishes about it, your Honor. I only have this to work with.

MR. PHILLIPS:

I object to Mr. Fawer's statements —

THE COURT:

Mr. Fawer, stop that. Don't get petulant in this courtroom. Now stop it. Keep quiet while I look at this.

Do you see what Mr. Fawer is referring to?

Excerpts from Testimony of Lawrence Ostrow - Cross

THE WITNESS:
Yes, I do.

THE COURT:
Do you recall the full statement?

THE WITNESS:
No, I — I recall possibly saying "something stopped you" and what it was in response to I don't recall.

* * * *

[262] Q Do you recall there came a point in time when the money had not arrived and you were going to leave and come [263] back the next day? Is that correct?

A Yes.

Q And then Mr. Harary said "Let's finish it today," is that correct?

Excuse me, did Mr. Harary say that or did you meet Mr. Sutton while you were waiting outside the premises?

A What transpired there was we both were a little nervous waiting for the money, waiting for Al Sutton to return, and we decided that we would — that I would leave and I would come back the next morning, because we didn't know how long it was going to take. It had already, I believe, been about an hour that we were waiting.

And as we were walking out Mike Sutton was at the door and Mr. Harary stated to him that I was going

to come back the next day, and then Mr. Harary and I proceeded outside and as we were outside all of a sudden Mr. Harary said he was worried. He got worried. He looked around and said he was worried and I asked him why he was worried. He never answered me. And then we decided that we would come back in and we would wait and we would wait for Al Sutton to return that day.

* * * *

[265] Q You then came back in the premises, am I correct?

A Yes, we did.

Q And Al Sutton arrived and you were paid the money, were you not?

A Not in that sequence. There were other things that happened, but eventually Al Sutton did return, yes.

Q And the $1250 was given to you and you counted it out?

A Yes, Mr. Harary brought it in in a brown bag.

Q And gave it to you?

A Yes.

* * * *

[266] Q And I take it, it is your testimony, Mr. Ostrow, that in the course of the whole day, September 22nd. 1970, you never suggested or broached or intimated in any way to the Suttons or to Mr. Harary

Excerpts from Testimony of Harold Wenig - Direct

that you were receptive to taking a bribe, and that is your testimony?

A Yes, it is.

[266a] MR. FAWER:

I have no other questions.

* * * *

[282] HAROLD WENIG,

called as a witness by the Government, being first duly sworn, testified as follows:

MR. PHILLIPS:

May I proceed, your Honor?

THE COURT:

Yes.

DIRECT EXAMINATION

BY MR. PHILLIPS:

Q Mr. Wenig, what is your employment?

A I am an inspector employed by the Inspection Service of the Internal Revenue.

Q What is the function of the Inspection Service of the Internal Revenue Service?

A The function is to investigate allegations of misconduct among Internal Revenue Service employees

and also investigate allegation of corruption regarding taxpayers and tax practitioners in their dealings with Internal Revenue Service employees, especially in the area of bribery.

Q How long have you been an inspector with the Inspection Service?

A Approximately five and a half years.

Q Do you know a man by the name of Larry Ostrow?

A Yes; I do.

Q Who is he?

[283] A Lawrence Ostrow was at the time of the occurrence an Internal Revenue agent assigned to the Manhattan District.

Q Did you have a meeting with Mr. Ostrow in August of 1970?

A Yes; I did.

Q Where did that meeting take place?

A That meeting took place in the offices of the Regional Inspector, at 26 Federal Plaza, New York.

Q That is right across the street from the Court House?

A That's the Federal Building, across the street; yes, sir.

Q And what was your conversation with Mr. Ostrow at that time?

MR. FAWER:

I object.

Excerpts from Testimony of Harold Wenig — Direct

MR. PHILLIPS:
It was brought out on cross-examination.

MR. FAWER:
Objection.

THE COURT:
I will overrule it, because you had Ostrow testify, Mr. Fawer, as to conversations and you plumbed his recollection.

MR. FAWER:
Exactly, and I will do the same thing with Mr. Wenig on cross-examination, but at this moment —

[284] THE COURT:
I think it has been opened to direct examination.
The objection is overruled.

MR. FAWER:
If I may be heard at the bench —

THE COURT:
No. You have made your point.
The objection is overruled.
Q What was your conversation with Agent Ostrow, Inspector Wenig?
A I told him at that time that I had received information regarding a corporation known as Sutton & Sutton, Ltd., and I had requested that audit — that

tax return — or there was two tax returns from the Federal Record Center, where they are kept.

I obtained these tax returns, and I told Mr. Ostrow that I had gone to the Audit Division with them, and I had requested an audit of the Sutton & Sutton, Ltd. firm, and when I was over at the Audit Division, and I spoke to the Chief of Audit, I requested that Mr. Ostrow be assigned to do the examination of this tax return.

I told Mr. Ostrow that the information I had received was that these people were known as pay-off guys and to conduct himself in a normal manner and to conduct a normal audit, and if in the course of the [285] examination an overture was to be made to him, that he immediately report this overture to me right after that meeting and, if possible, when the overture is made, to delay any action on receiving anything they may want to give him at that time, postpone it in any manner and then report back to me.

Q Did you see Agent Ostrow on September 2nd of 1970?

A Yes; I did.

Q Where did you see him?

A I once again saw him at the office of the Regional Inspector.

Q And what was your conversation with Agent Ostrow on that day?

MR. FAWER:

I object again, your Honor.

Excerpts from Testimony of Harold Wenig — Direct

THE COURT:

Overruled.

A At that time, Mr. Ostrow reported to me that he had received overtures from the tax representative, Mr. Harary, and the taxpayer, in that they had offered him a — an expensive Yashika camera and also that Mr. Harary had offered the revenue agent the free services of a prostitute, which he declined. And at that time Mr. Ostrow prepared an affidavit of what had occurred, and he signed that affidavit in my presence.

[286] Q Did Mr. Ostrow say when the next time he was supposed to meet with the taxpayer or their representative was?

A Yes; he did.

Q When did he say that was to be?

A He said the next meeting was scheduled for the 4th of September, when the tax representative was to bring to Mr. Ostrow tax returns, personal tax returns of the corporate officers of Sutton & Sutton, Ltd., which Mr. Ostrow had requested from the tax representative.

Q Did you tell him anything about this meeting, about this September 4th meeting?

A Yes.

Q What did you tell him?

A I told him that he would have to delay this meeting because it was not enough time to prepare him in the manner in which we would normally prepare an agent who was to go out a second time once an overture had been received by him, and I told him to

call Mr. Harary on the phone and tell him that he could not make that meeting that was scheduled for the 4th.

Q Between September 2nd and September the 22nd, did you have occasion to call the Israeli Consulate here in New York?

[287] A Yes; I did.

Q What were the circumstances of your making a telephone call to the Israeli Consulate?

MR. FAWER:

I object, your Honor, on direct examination.

THE COURT:

Overruled.

A Well, Mr. Ostrow told me that an issue had come up in his examination of the Sutton & Sutton, Ltd. returns, in which they claim — that is, the taxpayers claimed that the capitalization of $199,000 had come from Israel, had been shipped to them, and I had known from personal contacts with other people that came from Israel that it was quite difficult to get money out of Israel and other Mid-East countries.

So this bothered me, and I called the Israeli Consulate, and I believe the person that I spoke to was a Mr. Schwartzberg — he had an accent — and I asked him as a matter of record what is the procedure when a person leaves Israel and there is money in Israeli that belongs to him? How does he go about getting this money out of Israel? And he told me that, first of all, they would have to make an

application to the Finance Minister of Israel, requesting whatever sum of money they felt they wanted out of Israel, and that it was very difficult to [288] take out large sums of money, and he told me that they could take out a few hundred dollars normally, and if the person was still an Israeli citizen that he couldn't get the money out. He would have to renounce his citizenship in order to get the money out of Israel, but that there would be a record in Israel in the Finance Minister's office if the money was taken out.

Q Did you pass this information on to Mr. Ostrow?

A The next time I saw Agent Ostrow I did tell him about that.

Q On September 22nd, did you see Agent Ostrow?

A Yes; I did.

Q When did you first see him?

A I saw him in the morning. He was at the office of the Regional Inspector quite early.

Q And what occurred then?

A At that time we gave Mr. Ostrow an attache case, and in this attache case was an electronic recording device known as a Minifon wire recorder. Now, this is a small wire recorder that fits into an attache case. It is secreted in the case, and there is a microphone outside that picks up the words that are spoken in the vicinity of that attache case.

Normally, this wire recorder would be good for [289] approximately four hours. Sometimes it runs less and sometimes more.

Q Did you see Agent Ostrow later on in the afternoon, late in the afternoon that day?

Excerpts from Testimony of Harold Wenig — Direct

A Yes. I didn't finish the end of the other question, sir.

Q All right.

Do you want to complete that?

A Yes.

There was also placed on Mr. Ostrow on the morning of the 22nd a small radio transmitter, about the size of a king-sized cigarette pack. This was secreted on his person, and this is a radio transmitter which enabled — which would enable us to listen to a conversation as it took place from a surveillance vehicle that we would be in, which would have a radio that would pick up the signal. So he had two electronic devices with him at that time, a Minifon recorder and this KEL transmitter.

Q Did you also search him for money?

A Yes; we did.

Q And how much money did he have on him?

A He had nineteen dollars on him.

Q Did you see him later that afternoon?

[290] A Yes; I did.

Q And where was that?

A I met him in the afternoon, about four or fourten in the afternoon.

Q And what did he do at that time? What occurred then?

A At that time he handed me a brown paper bag containing a large sum of money.

Q I show you Government's Exhibits 3 and 4 in evidence.

Can you identify those?

Excerpts from Testimony of Harold Wenig — Direct

A This is the brown paper bag that the money was in because —

Q Referring to Exhibit 3?

A Yes. My initials are on it, plus the date, 9/22/70. And Mr. Ostrow's initials are underneath.

This is the money that was in the brown paper bag. There was $1250 in bills, which I counted at that time in the vehicle when Mr. Ostrow handed me the bag.

Q You are referring to Government's Exhibit 4 in evidence?

A That is correct, sir.

Q And do your initials appear on that?

A Yes. On each one of the bills my initials [291] appear with the date and also Mr. Ostrow's initials appear, and these initials were placed on the bills that date.

Q Now, Inspector Wenig, directing your attention to September 29, 1970, did you participate in the arrest of one Charles Harary?

A Yes; I did.

Q Do you see him in the courtroom?

A Yes; I do.

Q Would you point him out, please?

MR. FAWER:

We concede the identification.

Q After you placed Mr. Harary under arrest, what occurred?

A Well, after Mr. Harary —

Excerpts from Testimony of Harold Wenig — Direct

MR. FAWER:
Have we placed where it was, your Honor?

THE COURT:
If you want to.
Where was it?

THE WITNESS:
He was arrested in his home at 2625 National Drive, which is located in the Mill Basin section of Brooklyn.

THE COURT:
At what time?

THE WITNESS:
Some time between eight and eight-thirty, I would say.

THE COURT:
In the morning?

[292] THE WITNESS:
In the morning.
Q What happened when you placed him under arrest?
A The first thing we did was, we showed him our arrest warrant and then advised him of his constitutional rights, which we had written down on a small printed sheet of paper, and Mr. Harary stated he knew his rights. And then he requested that he be permitted to take a shower. He was in a state of undress. As

a matter of fact, he was just in his shorts at that time. He had just got up. The maid had let us in the door. We had identified ourselves to the maid, and the maid said Mr. Harary hadn't been up yet, and she got him up.

Q And where did you take Mr. Harary after you placed him under arrest?

A Well, after he got dressed he had breakfast, and we got into our automobile. We had a Department car. And we drove him to the office of the Regional Inspector, and at that time he was then photographed and fingerprinted in the office of the Regional Inspector, which is our arrest procedure.

Q Is that your normal arrest procedure with anybody you place under arrest?

A That is correct, sir.

Q And the Regional Inspector again, Inspector [293] Wenig, is across the street, at 26 Federal Plaza?

A Yes; it is.

Q And after that, what did you do?

A After we completed our processing, we came across the street to this building.

Q What time did you arrive at this building?

A I would say somewhere between ten-thirty and eleven o'clock.

Q And where did you go in this building?

A We went to an Assistant United States Attorney, Andrew J. Maloney's office.

Q Located on the fourth floor?

A That is located on the fourth floor; yes, sir.

Excerpts from Testimony of Harold Wenig — Direct

Q And what occurred when you arrived at Mr. Maloney's office?

A Present in Mr. Maloney's office at that time was another Assistant United States Attorney, John Sale. And I brought Mr. Harary into the office, and the first thing he did when he sat down, Mr. Maloney advised Mr. Harary of his constitutional rights, and he told him at that time that he had a right to remain silent, that he didn't have to answer any questions, and if he chose to answer any questions that he could stop answering questions at any time, and also that anything he said at that [294] time could be used against him.

Mr. Harary was also advised that if he wanted a lawyer or wanted an attorney present, he could request an attorney and that if he couldn't afford an attorney that the Court would provide one for him.

Q What did Mr. Harary say? What was his response?

A He stated that he understood his constitutional rights. And at that time Mr. Maloney proceeded to ask him questions.

Q Do you recall what Mr. Maloney said and what Mr. Harary said in response to Mr. Maloney's questions?

A Yes. Mr. Maloney asked Mr. Harary, was this the first time he had ever paid a bribe, and Mr. Harary said yes, and he further stated that he would like to answer questions; he would like to cooperate with the United States Attorney's office, but at that time he would like to speak to his lawyer first and

consult with his lawyer, and he also said he would like to go into another room and meditate for a little while.

While he did go into an adjoining room, Mr. Maloney ceased his questioning as soon as he requested his attorney, and in the next room there was a telephone, and he placed a telephone call to his attorney, who was [294-A] Mr. Irwin Klein, and we waited until Mr. Klein appeared at the Court House.

Q How much later did Mr. Klein appear?

A Some time around two o'clock in the afternoon Mr. Klein appeared, and at that time Mr. Harary conferred privately with his attorney: Mr. Klein.

[295] Q How long did you confer with him?

A I would estimate about 15 minutes.

Q What occurred after that?

A After that Mr. Harary entered Mr. Maloney's office and he was accompanied by his attorney Mr. Irwin Klein, and present in the office at that time was myself, Assistant United States Attorney John Sale, and Mr. Maloney and at that time Mr. Maloney once again gave Mr. Harary his constitutional rights as I so stated before —

Q Was Mr. Klein present when he did that?

A Yes, he was.

Q What occurred after he advised him of his constitutional rights again?

A Mr. Harary stated he understood and once again Mr. Maloney continued his questioning of Mr. Harary.

Q What questions did he ask on this occasion and what responses did Mr. Harary give?

Excerpts from Testimony of Harold Wenig — Direct

A He first asked Mr. Harary did he pay a $1250 bribe to Revenue Agent Lawrence Ostrow and Mr. Harary said "Yes" and then Mr. Harary was asked who was instrumental in pushing this bribe and Mr. Harary stated that the Sutton Brothers were behind it and they had asked Mr. Harary, that is, the Sutton Brothers had asked Mr. Harary to close the deal and then he was asked why was the bribe paid and Mr. Harary [296] stated that he was giving the Sutton Brothers a blow-by-blow description of what the Revenue Agent was doing during the examination and when the Revenue Agent told Mr. Harary that there could be a possible tax assessment of $60,000, he had communicated this fact to the Suttons and Mr. Harary said, since people don't like trouble and if the agent looks long enough he is going to find something wrong, they had decided to pay him.

And Mr. Harary then stated that he and the Suttons felt that after the initial meeting with Revenue Agent Ostrow on September 1st that the agent was approachable and that was the reason that they had tried this attempt.

Then Mr. Harary was asked who was the one that made the initial overture of the bribe; who was the one that first offered the bribe, and Mr. Harary stated that he was the one that offered the bribe first and not the agent. The agent didn't make any pitch for a bribe; that he was the one.

Then he was asked how much money did he ask the Suttons for to pay off the Revenue Agent and Harary stated that when he had spoken to the Suttons, he had

told them that the Revenue Agent had agreed to accept $2,000 and when Mr. Sutton, Abe Sutton, had come back from the place where he had obtained this $2,000, he had given this money to Mr. Harary and Mr. Harary was asked if he kept any of that money [297] for himself and he said "Yes," that he took $750 out of that $2,000 and kept it for himself, without telling the Suttons what he was doing and without telling the Revenue Agent.

Q Inspector Wenig, did he say where Mr. Sutton had gone to get the money?

A I don't recall specifically whether he said it was a bank or where; I don't recall at this time but in addition, he was asked, Mr. Harary was asked, whose idea was it to offer the free services of a prostitute to Mr. Ostrow and Mr. Harary stated that it was purely his idea to offer Ostrow the services of a prostitute.

Q Do you recall anything else about what Mr. Harary said to Mr. Maloney that day?

A Yes. He was asked about the $199,000 in capitalization. He was asked whether he had seen any of the checks that supposedly came from the Mid-East for the capitalization of this firm and he said, well, the Suttons told him that the money had come from the Mid-East but he had never seen the checks himself.

Q Do you recall anything else that was discussed or that Mr. Harary said to Mr. Maloney?

A I don't recall at this time.

Excerpts from Testimony of Harold Wenig — Cross

Q Was Mr. Irwin Klein, his attorney, there during the entire time that he made the statements you just testified [298] about?

A Yes, he was.

MR. PHILLIPS:

I have no further questions.

CROSS EXAMINATION

BY MR. FAWER:

* * * *

[308] Q You began seeking to investigate the Suttons —

MR. PHILLIPS:

Objection as irrelevant.

Q — in August of 1970, did you not?

MR. PHILLIPS:

Objection, your Honor.

THE COURT:

Overruled.

[309] A Well, if you would call initiating an audit to see whether information that was received was good

information, yes, I would say that was an investigation.

Q Now, as I understand it, the information that you had in August of 1970, correct me if I'm wrong, is that from some informant, am I correct, the information came from some informant?

A A confidential source.

Q That is a human being, a confidential source; I just want to know, yes or no.

Was it an electronic device?

MR. PHILLIPS:

Objection, your Honor.

THE COURT:

I thought it was agreed it was a human being.

Q Was it a human being?

A Yes, it was.

Q And that which you knew, is that according to this human being, this source?

A Yes.

Q — the Suttons were known as pay-off people, is that accurate?

A Pay-off guys.

Q Pay-off guys; excuse me.

You had no knowledge, am I accurate, about their [310] involvement in any dealings or any suspected pay-offs by the Suttons to anyone in Internal Revenue, is that correct?

A That is accurate.

* * * *

Excerpts from Testimony of Harold Wenig — Cross

Q You had no information aside from that that the Suttons had in fact paid off any individual, is that accurate?

A Are you talking any individual in the Internal Revenue or —

Q In the whole world.

A Well, no, the information was that they had, that they had paid off people, government people, but they didn't mention federal government. They mentioned municipal government, City government people.

Q Who?

A They didn't mention specifics but this was the information.

Q That they had paid off or they were willing to pay off?

[311] A No, that they had, that they were pay-off guys.

Q Did you ask them who? Did you ask your informant who?

A No, he wasn't specific as to who but he said they were city employees. That was a general statement.

Q You also learned or were advised that these individuals, the Suttons, had some cash businesses, did you not?

A Oh, yes.

Q You knew that at that point in time?

A Oh, yes, they had six discount stores, right.

Q At that point in time, so far as you know, there was absolutely no scheduled audit of the tax returns of any of the Suttons' entities?

Excerpts from Testimony of Harold Wenig — Cross

A Not to my knowledge.

Q I am right then, is that what you are saying?

THE COURT:

He said "not to his knowledge."

Q To your knowledge?

A Not to my knowledge.

Q To your knowledge as of this moment in time, today, do you know of any scheduled audit that had been planned prior to the audit you initiated in August of 1970?

A Not to my knowledge.

Q Now, as I understand it, the Inspection Service is charged with the responsibility of investigating corruption [3.2] by Internal Revenue employees themselves?

A Yes.

Q And corruption on the part of taxpayers or taxpayer's representatives in their dealings with Internal Revenue employees?

A Yes.

Q That is your jurisdiction, your function?

A That is correct.

Q Do you conceive of it as your function that it is your right or obligation, based on the information you had in this situation, to in effect initiate an audit, to see if a bribe would be offered?

A This was not my decision, sir. I had discussed this with my supervisor prior to the initiation of this audit and after conferring with him at length, it was

decided that this would be the proper procedure to have the audit started of these tax returns.

Q My question to you, Inspector Wenig, on that stand, do you conceive it is the function of the Inspection Service and/or of yourself to commence an audit when none is scheduled to determine whether taxpayers will give a bribe if an audit is in fact conducted?

MR. PHILLIPS:

Objection, your Honor. It is argumentative and irrelevant as well.

[313] THE COURT:

Overruled.

* * * *

A This could conceivably come under our intensified integrity program whereby we would sometimes look into situations that we receive from informants, knowing that the information comes from a reliable source, that we could initiate something like this, based upon the facts that we receive, knowing that the corporation was a large taxpaying corporation, that there were cash sales involved, there may be a possibility that the corporations were not filing their proper tax returns, together with the fact that they were known as pay-off guys, would certainly be a good indication that they could be audited.

Excerpts from Testimony of Harold Wenig — Cross

Q Could be — anybody could be audited, couldn't they?

A Yes.

Q I can be audited, can't I?

A Yes, sir.

Q The judge can be audited, can't he?

A Yes.

* * * *

[314] Q You knew that these people were in cash businesses, right?

A Oh, yes.

Q There was no suggestion, was there, at that point in time, that there was any unreported income by these people?

A No, there was no specific.

Q So that the fact that they were in a cash business was no different than any other entity that was in a cash business?

A Not necessarily.

Q Are you agreeing with me.

A No, I am not.

Q They were in a different posture?

A Yes, because of the other facts that went along with it; the fact that they were pay-off guys.

Q The fact that an informant said that they were pay off guys?

A Now, there are informants that we get information where we may not pay attention to it and there are informants [315] that we know from past experi-

ence that are reliable and that we have to pay some attention to the information that we receive.

Q Are you telling us that if the informant from whom you received this kind of information you consider reliable, then you feel free to initiate an audit under these circumstances?

A I didn't say I felt free. I said after due deliberation and consideration of the facts with my superior, that I am not the sole judge and that even if I request the audit, the audit division is the sole judge and they are the ones that if they want not to audit that return, they don't have to. I can't order them to. I can only request.

Q And you can only request that Lawrence Ostrow be specifically assigned to the audit?

A Yes.

Q And they specifically assigned him?

A In this case, yes. There have been occasions where I have requested agents and they were not available or they were turned down for some reason, they assigned me another agent. So that on every occasion you don't get the one you want.

Q And you had previous dealings with Agent Ostrow, had you not?

[316] A Yes, I did.

Q And you knew that the Inspection Service had had previous dealings with Agent Ostrow?

A I did.

Q And there were a couple of situations where you had similar types of audits that were conducted with Agent Ostrow being the agent assigned?

Excerpts from Testimony of Harold Wenig — Cross

A That is correct.

Q And during the course of some of those audits, Agent Ostrow was wired for sound, was he not?

A There was only one other occasion that he worked on one of my investigations. You said, you acted like there was more than one. There was one prior to this.

Q But there were other times that he worked with Inspection?

A That is correct.

Q And you knew that; you were privy to the facts that you and Inspection were satisfied with the kind of work Agent Ostrow had done?

A Yes, we were satisfied.

Q And it was one of the reasons that you chose him for this task?

A He was chosen for his integrity, yes.

Q And it is a fact, is it not, that when you called [317] him in, you told him as well about the fact that these people were in a cash business?

A I believe I mentioned they have some stores, that dealt in cash, yes.

Q And you told them, of course, they were pay-off guys and to be alerted to that possibility?

A Oh, yes.

* * * *

[318] Q By the way, I take it that you considered this a normal, routine audit?

A Well, what do you mean by a normal, routine —

Excerpts from Testimony of Harold Wenig — Cross

THE COURT:

I'm sorry. I have to ask the same question.

MR. FAWER:

Well, I thought I heard somebody testify, namely, Inspector Wenig, that he told Agent Ostrow to conduct a normal, routine audit, and that is what I am asking.

A You mean to conduct himself in a normal manner? Is that what you mean?

Q To conduct an audit in the normal routine way.

A Yes.

Q Which is effect meant that the audit was under his control, was it not?

A The examination was under his control, yes.

Q You had nothing to with the audit?

A Not necessarily.

Q Was the audit any business of yours except insofar as there may have been an overture made?

A Yes, it was. If in the course of my duties — I am mainly an Internal Revenue Service employee. Primarily an employee of the Internal Revenue Service and if I could come across any information that would help that agent in [319] conducting his audit so that he would have full knowledge of what was going on, I certainly would be remiss if I didn't get that information to him.

Q By the way, Inspector Wenig, based on the information you had from your informant, you could have, could you not, notified Audit to tell you when and if Sutton & Sutton was scheduled to be audited, could you not?

Excerpts from Testimony of Harold Wenig — Cross

A But they were not scheduled to be audited.
Q Exactly.

THE COURT:
No, answer the question. The question is, could you have found out if they were scheduled for an audit? In other words, could you have picked up the phone?

THE WITNESS:
Oh, I believe I did and they were not. That is why I pulled out the returns.
Q And tell me, I assume that you could have told the Audit Division, although you now knew that they were not scheduled in that point of time for audit, to let you know if at some point in the future there was going to be an audit conducted?
A Well, it is very — the chances are that if you take a corporation and you sit down and wait for them to be audited, it may take 20 or 30 years.
Q And you mean you might not get the overturn if you [320] wait 20 or 30 years?
A Not necessarily.

MR. PHILLIPS:
I object, your Honor.

THE COURT:
All right. He answered it.
Q Between September 2nd and September 22nd, when Ostrow came back and reported what he did dur-

ing that period you knew that he had not requisitioned any personal returns of the Suttons, am I correct?

A What was the period sir?

Q Between September 2nd and September 22nd.

A But he did. He had asked Mr. Harary for the returns.

Q You know what I mean by requisition, do you not?

A He had asked Mr. Harary to bring him the returns.

Q Exactly. He requisitioned the returns, the original returns were sitting in the Internal Revenue Record Center, weren't they?

A Yes.

* * * *

Q Let me put it very simply. He had not requested that the official returns be sent to him from the Record [321] Center, had he?

A Well, he had expected to get the copies from Mr. —

THE COURT:

No, that isn't the question.

Had Mr. Ostrow asked the official record center to send him the original returns of Sutton & Sutton, Ltd.?

THE WITNESS:

No, he did not. He did not.

Excerpts from Testimony of Harold Wenig — Cross

Q You took it upon yourself to requisition those returns from the record center?

MR. PHILLIPS:
Objection as to form, your Honor.

THE COURT:
Overruled.
A I requisitioned those returns, yes, I did.
Q He could have requisitioned them, too, could he not?
A But he would have a problem if he did.
Q What kind of problem?
A A time problem. Normally I could get the return the same day I requested it. The Audit Division, it would take somewhere between six to eight weeks, by that time he would have had his meeting on the 22nd, and in order to get the returns to him so that he could look at them prior to the 22nd, I got them as rapidly as I could, feeling that I was assisting the man.
Q Of course, he could have asked you to do that and then you could have done the same thing, couldn't you?

[322] MR. PHILLIPS:
Objection, your Honor, entirely irrelevant.

THE COURT:
Overruled. I guess he could have.
A Yes.
Q But he didn't ask you?

Excerpts from Testimony of Harold Wenig — Cross

A That's right.

Q And he was conducting the audit without your guidance?

A He was conducting the audit, yes, sir.

Q Without your guidance?

A What do you mean by guidance?

Q Without any influence or involvement on your part.

A Well, I had no active part in the audit, no.

Q But you gave him the returns to examine?

A Yes. I certainly did.

Q And he examined them at that time?

A He looked at them, yes.

Q Now, I understand that you also as part of your non-involvement, called the Israel Consulate in New York?

A Yes, I did.

Q And this had to do with part of your work on the overture that had been made?

A It possibly could. It possibly could because the story that they had told him as to how they got the money [323] didn't just gel with me, knowing what I did about getting money out of the Mid-East, and I felt that I was very curious, and I felt I should check and see whether or not there is any credence to this.

* * * *

Q You said that you thought it did have some relationship to the overture, is that right, that your inquiry did?

Excerpts from Testimony of Harold Wenig — Cross

A Possibly.

Q Am I correct in stating that its connection was that you felt if an overture was to be made it would be in connection with the $199,000?

A Possibly.

Q And that to the extent that you could eliminate the validity of their story, it would help the agent on the audit?

A This is possible, I don't know.

* * * *

[325] Q Inspector Wenig, it is a fact, is it not, that prior to August of 1970, you had absolutely no information about Charles Harary?

A Now, what date in August? Because I did have information when I got the tax return in August that his name was on the tax return.

Q You mean, he was the taxpayer's representative?

A Right.

Q — whose name appeared on the return you [326] requisitioned?

A That is when I found out about Mr. Harary.

Q Aside from that writing with his name on it, did you know one single iota of information about Charles Harary?

A No, I didn't.

Q As of the date that you arrested him aside from what Agent Ostrow told you, did you have any information about Mr. Harary?

Excerpts from Testimony of Harold Wenig — Cross

[327] MR. PHILLIPS:
I believe it has been answered, your Honor.

THE COURT:
I will allow him to answer it.
A In regards to what?
Q Anything.

THE COURT:
Aside from what Agent Ostrow told him?

MR. FAWER:
Aside from what Agent Ostrow told him.
May the pause be noted?
A Yes. I — I knew that he had represented certain people. I had checked the files, and I found out that he had represented certain taxpayers in front of the IRS.
Q And without the slightest suggestion of a blemish on his record?
A There was nothing that I knew of.

MR. FAWER:
No further questions.

* * * *

Motions

[335] MR. FAWER:

Your Honor, next I would suggest and [336] urge your Honor that we have clearly made out a case of entrapment as a matter of law and that the case should be dismissed as of this point in time. I submit that there is absolutely no evidence of predisposition on the part of the defendant on trial of this case. The Government is free to bring that evidence in, they know of the entrapment defense, it's the only key issue in this case and the record is absolutely barren of evidence of predisposition of the kind, quality that has been referred to consistently by the Court of this Circuit and the Supreme Court and I submit that the case should be dismissed by your Honor as a matter of law at this point on the grounds that we have proven entrapment as a matter of law.

THE COURT:

Motion denied.

MR. FAWER:

I would then, your Honor, finally, make the argument that I made at the end of the case the last time and I make it again now.

The Government and the defense both agree that the jury cannot bring in a verdict of guilty on Count 2 which is the bribery count and Count 3, the gratuity count. It's clear that the case has now for the second time been submitted, introduced in evidence, presented to this jury as, clearly, a case of bribery with intent [337] to influence. The only possibility that that intent

did not exist is if the entrapment defense negates it. I submit that it is nothing but confusing to a jury to permit the gratuity count to go to the jury. I recognize that it permits a compromise verdict or one further chance for a compromise verdict but it seems to me that simply confuses the jury by putting to them a proposition of law which has to be superimposed on a state of facts which does not exist on this record and, for that reason, your Honor, I submit that the gratuity count should at this point be taken away from the jury.

THE COURT:

Motion is denied.

* * * *

[351] THE COURT:

Motions, Mr. Fawer?

MR. FAWER:

Your Honor, I would renew each and every motion that I made at the end of the Government's direct case, and, in addition, I would move for a dismissal of the case, at this point, a directed verdict, on the grounds that having had an opportunity to produce rebuttal evidence to introduce evidence of predisposition in any form, the Government has wholly failed to produce a single witness or a single bit of evidence of predisposition which can rise in any way to the level required

Excerpts from Summation of Counsel for Defendant Harary

to permit this case to go to the jury on that issue of [352] predisposition.

THE COURT:
No. Denied.

* * * *

[358] MR. FAWER:
Thank you, your Honor.

May it please the Court, Mr. Phillips, ladies and gentlemen of the jury:

We have only been together for three days now, and in that short period of time you have been afforded an opportunity of seeing your government in operation. Make no mistake about it, it is your government; it is my government; it is all of our government. The people who run [359] it, who are responsible for it, are responsible to us, and we are responsible for their acts.

In our democracy there are only a few ways in which the people can speak out about the conduct of their government. They can do it at the ballot box, they can do it by petitioning their legislature and in the very rare instances they can do it as the voice of the jury in a criminal case. You have this opportunity in this case of the Government versus Charles Harary.

The government would have you believe, ladies and gentlemen, that this is just a simple case of money

being paid by Mr. Harary on behalf of the Suttons to a Revenue Agent, but we all know that this case involves much more than that. It goes to the very heart of the problem of the government of men and the misuse of the perversion of governmental power.

The crucial issue in this case — and his Honor will charge you on it — is whether the idea of a bribe was Harary's from the outset, or whether in fact it was suggested, instituted, intimated or induced by the government agent.

Unless in your minds and hearts you can say that the government, that the prosecutor has been able to convince you beyond a reasonable doubt that Ostrow didn't [360] solicit the bribe, you must acquit Mr. Harary.

I submit to you that the testimony in this case veritably reeks of a premeditated plan to entrap the Suttons into committing the crime. The young man sitting at that counsel table, the defendant, was no more than a pawn in the Internal Revenue Service's attack on the Suttons. In fact, what this case really is about is the Internal Revenue Service versus Abraham and Meyer Sutton.

From the opening statement of Mr. Phillips and from Agent Ostrow's direct testimony you were led to believe that this is a simple case of an agent conducting a routine audit who is offered a bribe, which he reported to Inspector Wenig, who wired him for sound, his continuing the audit, being offered a bribe and the arrest.

That's all you were told about the case on direct.

Excerpt from Summation of Counsel for Def. Harary

What were the real facts in issue? Agent Ostrow was no ordinary agent, and this was no routine audit. Far from it. I said at the outset, if you recall when I first spoke to you, that it is perfectly proper for the government to root out corruption. If in the course of an audit, a bribe is offered, it should be promptly reported. It should be investigated, it should be prosecuted to the limit. It is the function of the government to catch criminals, but not to create them. But create [361] them is just what Inspector Wenig set out to do in this case.

Remember the testimony from Wenig's lips and from Ostrow's lips. That is what counts — what they said on that witness stand.

Wenig works for the Inspection Service. They are devoted to rooting out corruption. Their function is rooting out corruption within the Internal Revenue Service and of people, of the citizenry, who would deal, who do deal with Internal Revenue employees. There is no question that was his function.

What happened? He had a tip from an informant that the Suttons were possibly pay-off people. That it was thought that they paid off municipal employees.

I asked him and you heard the testimony — by the way, remember his testimony? When he is on direct examination, both he and Ostrow, he speaks in paragraphs, the words just flow. It is like Proust on the stand.

On cross-examination it is like pulling teeth. Suddenly the pauses are interminable and what do we hear: "I don't recall. I don't remember."

Excerpt from Summation of Counsel for Def. Harary

Keep it in mind.

But this man, Inspector Wenig, he has this tip, this information. He admits that these people, the Suttons, [362] had absolutely no prior dealings with any federal agency. He knew of nothing. But based on this, and the fact that they were in cash businesses, that they had some cash businesses, which millions of people in this country do, he has an audit initiated, and why? To see whether if an audit were conducted, whether these people might possibly make an overture to an agent. That is the entire catalyst for the initiation of the investigation in this case.

What does he do? There is no audit underway. None is planned, none is scheduled. He has no way of getting at the Suttons. Why he wants to get at them, why that is his function, we don't even know. But he wants them. That's clear.

[363] So what does he do? He takes it upon himself to cause an audit to be performed, to test the mettle of these men, these citizens, to see if they will come through the ordeal unscathed, or will they evidence the human frailty and succumb in the course of what he calls a normal audit.

Ladies and gentlemen, do you comprehend the enormous perversity of the concept that was put before you? He is saying that if there should be a similar allegation of this vague, this unsubstantial, this ridiculous nature, if such an allegation should be made about any one of you, that any one of you might possibly do something improper if confronted with a certain set of circumstances, that the Government has the

right to put that set of circumstances in front of you to see whether you can come through that ordeal.

I asked him how, under what conceivable interpretation of his function could he conceive that this was part of his function, and we had one of those pauses, and he says, and I quote:

"This could conceivably come under our intensified integrity program."

It is straight out of George Orwell's "1984". Test the citizenry. See if they are pure of body and of [364] spirit.

I say that is no function of this Government, not of your Government and not of my Government. That is a perversion of Government. This is not what our Government is all about.

If this is permitted, if this is condoned, where does the next abuse of power come?

We are not immune to the spread of a malignancy which has affected other countries and other places. I am not trying to throw a spectre of horror in. It starts small. But we are not immune here.

Thank God, I have the freedom to speak to you the way I am in this courtroom, and thank God that you have the power to speak as well.

If we sit by and permit an injustice to be done by the Government, then an injustice is being done by each and every one of us. You have the reins in your hands. You can check this kind of conduct, or you can permit it to run rampant. But it is up to you, your collective choice as a jury in this Court House, at this time and at this place.

Excerpt from Summation of Counsel for Def. Harary

In our prayers, we employ the Lord, "Lead us not into temptation." Do we have to implore the Internal Revenue Service, to make the same plea to the Internal [365] Revenue Service?

Inspector Wenig may be a perfectly nice man. I am sure he loves his children and his wife. But he totally misconceives his function He cannot play God. I cannot believe that he is empowered to tamper with the futures of any of us the way he did in the cruel way that you have seen in this case.

It is too late for him now to say, "What have I wrought?" What he so capriciously began, so evilly and capriciously began in August of 1970 ended with Charles Harary being dragged from his bed eight-thirty in the morning on September 29th.

But he wasn't just content with causing this audit to be begun, which but for his request would never have taken place. Remember that.

What did he do? He chooses a very particular type of individual to conduct this routine audit. The call goes out to Larry Ostrow, an agent skilled in the art of conducting audits of this very special kind. Not satisfied with having created the need for an audit. Wenig decides to tip the scales further and assign Ostrow, that agent, sophisticated in the nuance of the overture, an agent experienced in the conduct of an audit while wired as a human transmitter, the agent of whom he said he was [366] very satisfied with the kind of work he had done before.

Excerpt from Summation of Counsel for Def. Harary

Thus, the team is together again, by design, Wenig and Ostrow, and here they go.

* * * *

[401] As soon as the arrest is made the pressure begins. Wenig is leaning on him. He is talking about, "Maybe you will have to stay overnight, and maybe you might have to stay overnight because the arraignment may take an extra day; you will have to stay in prison." He is talking about accountants in Danbury Prison. He is asking what do you know about the Suttons. Tell us about the Suttons. That's what all this was about, and they bring Harary down in the court house in an office.

[402] He said, "I will talk to you, sure." The lawyer comes, and he talks for 15 minutes and what does Harary do? He admits everything you know to be the facts in the case. He admits, number one, he has never done this before. He admits he paid the $1250. He admits that he did it on behalf of the Suttons. And then they ask him an interesting question.

You see, they had a week now. September 29th. They had a week to examine the tape. They know what you now know, that is, you know what appears on tape and that tape spells entrapment.

So what do they do? They asked him, "Charlie, who initiated the bribe? Who mentioned the money?"

Charles says "I did." Of course he did.

Excerpt from Summation of Counsel for Def. Harary

MR. PHILLIPS:

Your Honor, there is no evidence that the government listened to the tape by the 29th.

THE COURT:

The jury can infer that.

* * * *

[403] MR. FAWER:

He told them all of these things. He never denied any of it. None of it. There is no question about who in fact insinuated the pressures to bribe in this case.

You have been exposed in this courtroom to the despicable picture, ladies and gentlemen — I submit — and I am using harsh terms because I can't bring myself to speak lightly about them — to the despicable picture of your government toying with the lives of men, forcing people to run a gauntlet which would not have existed but for their creating it.

The whole issue in this case is the question of entrapment and the judge will charge you as clearly as can be on that point and the government's burden on that issue.

By no stretch of the imagination has the government demonstrated, as it must, beyond a reasonable doubt that the defendant would have paid the bribe without the subtle and not so subtle pressures exerted by Agent Ostrow.

* * * *

Excerpts from Summation of Government Counsel

MR. PHILLIPS:

May I proceed, your Honor?

May it please the Court, Madam Forelady, ladies and gentlemen of the jury, Mr. Fawer:

What you have listened to for approximately one hour is Mr. Fawer telling you that what you heard in this courtroom was a perversion of governmental authority.

That is not what you heard in this courtroom. That is not what you heard from that witness stand. What you heard from that witness stand was the attempted corruption of an honest government agent by a corrupt and sophisticated accountant.

The testimony did not establish that Mr. Harary was an innocent pawn here but it showed that Mr. Harary bribed a government agent, $1250, which is right here, ladies and gentlemen, and it showed that the bribe wasn't initiated by the agent in this case but it was initiated [406] by the defendant Harary.

You heard that from the witness stand, from Agent Ostrow and you heard it from Mr. Harary through Inspector Wenig's testimony and it is based on the testimony from that witness stand and that witness stand alone that you must decide this case, not on what Mr. Fawer tells you.

Mr. Fawer wants you to believe that the government instigated this bribe. From the very beginning of this audit examination Mr. Harary was ready and willing and prepared to pay a bribe. Mr. Ostrow hadn't been there more than a couple of hours on September 1st, 1970, when he was offered the services of a prostitute.

Excerpts from Summation of Government Counsel

He hadn't been there more than a couple of hours in the afternoon on the same day when he was offered a camera.

The money that the defendant Harary paid to Ostrow on September 22nd was no more induced by Agent Ostrow than was the offer of the prostitute and the camera on September 1st.

This is not a complicated case, ladies and gentlemen. The facts of this case are very simple and I will just summarize them briefly.

The audit examination was commenced on September 1st, 1970 and the defendant made these two bribe overtures to Agent Ostrow on that occasion that I just mentioned; [407] the prostitute and the camera. These were reported by Agent Ostrow to Inspector Wenig, and on September 22nd the audit examination was continued.

On that day the defendant Harary paid the sum of $1250.

Now, there was originally $2,000 in here. There is now $1250 which the defendant paid to Agent Ostrow, because he kept $750 for himself. $750 of the Suttons', the taxpayer's money he kept for himself without even telling the Suttons.

On September 29th, 1970, he was arrested and in the presence of his attorney in this courthouse he confessed and he told everything and he told Mr. Maloney that this bribe was initiated by him, it was entirely his idea, the only inducement in this case was done by the Suttons, there was no inducement, no initiation by Agent Ostrow.

Excerpts from Summation of Government Counsel

And what is the defense in this case? Character evidence. The government doesn't contend that the defendant Harary had a bad reputation in the community. You hardly go around advertising the fact that you paid a bribe to a government agent.

As for character witnesses, Benedict Arnold could have called George Washington as a character witness.

And what is the other defense in this case?

[408] Entrapment. All right. Let's go to this issue and let's go there right now.

Mr. Fawer points to the initiation of the audit examination. This audit examination wasn't initiated solely by Inspector Wenig. He referred it to the Inspection Service as the Inspection Service has done hundreds of times for the last year and as Inspector Wenig has done about 40 or 50 times while he was with the Inspection Service.

It was the uncontradicted testimony of Agent Ostrow that there is no indiscriminate selection of audit examinations to be conducted and that is done by the Internal Revenue Service. It is done after information is received and after a careful selection process. Because, ladies and gentlemen, if the Inspection Service is not permitted to refer information that they receive to the Audit Division, with a recommendation that an audit examination be conducted, they might as well close up shop because their function would be nil; there would be nothing for them to do. Their function is to investigate corruption.

But, ladies and gentlemen, consider this, and this is even more important. There was a basis, there did

turn out to be a basis here for conducting an audit examination. Why else was the bribe paid? Why else did they pay the bribe to Agent Ostrow?

[408a] Recall what Harary said to Mr. Maloney in the United States Attorney's Office here. He told them that the Suttons told him that if the agent looked long enough he would find something and that is precisely why the bribe was paid here, to avoid Agent Ostrow finding something wrong.

* * * *

[417] What did Mr. Harary say to Mr. Maloney all the time in the presence of his attorney? He said that he kept the Suttons apprised of the audit examination, as to what was going on. He said that he kept $750 for himself and most importantly, he said that he initiated the bribe offer, not the agent, and that is the issue to decide and the two people who were involved in this case, in this bribe, Agent Ostrow and Harary, both of them told you that it was Harary, [418] Harary who initiated the bribe offer, not the agent.

You heard that from Agent Ostrow on the witness stand and you heard it through his own statement to Mr. Maloney.

I ask you, ladies and gentlemen, to listen to the charge that his Honor will give you, the principles of law which you must apply because in reaching your verdict, you must apply those principles of law and you must apply them not to what you hear in sum-

mation from defense counsel but what you hear from that witness stand right there.

That is your sworn duty, and when you hear his Honor's charge on entrapment, you will hear his Honor mention the phrase, opportune moment — as not presenting the defendant with an opportune moment to commit a crime is not entrapment. At the very, very most, that is that the Internal Revenue Service did here — they presented him with an opportune moment. But there was no inducement, there just simply was no initiation. The mere fact that an audit examination was conducted does not constitute initiation or inducement because if it did, if it did, the Inspection Service might as well close up shop and look for employment elsewhere.

Listen to his Honor's charge also on entrapment on predisposition. Was the defendant ready and willing? The [419] prostitute and the camera tell you that. But most importantly, the defendant himself said that he initiated the bribe.

* * * *

What has he got left? The only thing he has left is to try to come in here and bamboozle you into believing [420] that the government initiated the commission of this crime by this defendant.

But you heard, ladies and gentlemen, from both of the parties involved, Mr. Ostrow and Harary, that the initiation came not from the government but from the defendant and this case does not involve Proust,

or well, Chief Justice Hughes — this case involves the corruption of a government agent in September of 1970; that is what this case involves, and I am sure, ladies and gentlemen, if you do apply your common sense, that you will have no trouble seeing through the smokescreen and arriving at the only just verdict in this case.

* * * *

[421] United States of America
versus
Charles R. Harary.

70 Crim 1104

New York, N. Y.
June 3, 1971.

CHARGE OF THE COURT

* * * *

[435] We now come to the second count, which is known as the bribery count, in the indictment. This count charges the defendant with a violation of Section 201(b) of Title 18 of the United States Code. This section makes it a crime for any person, directly or indirectly, corruptly to give or offer anything of value to any public [436] official with intent to influence an official act.

Excerpts from Court's Charge to the Jury

In order for you to return a verdict on this count against the defendant, you must be convinced that each of the following three elements has been proven beyond a reasonable doubt:

First, that on or about September 22, 1970 the defendant wilfully and knowingly gave $1,250 to Lawrence Ostrow; second, that at that time Ostrow was an agent of the Internal Revenue Service and was acting in his official capacity; and

Third, that the defendant paid this money to Ostrow with the specific corrupt intent to influence Ostrow's audit of the income tax returns of Sutton & Sutton, Limited for the short tax year from July 21, 1967 to August 31, 1967 for the fiscal year ending August 31, 1968.

As to the first element to be proved, there is no dispute that the defendant gave $1,250 to Ostrow. However, the mere fact that money was given by the defendant to Ostrow is not enough to satisfy this element of the offense. You must also find the money was given knowingly and wilfully by the defendant.

The definitions I have already given of "knowingly" and "wilfully" and "specific intent" under [437] the conspiracy count of the indictment apply equally as well to this count.

As to the second element to be proved, there is no dispute that at the time the money was given to Ostrow he was an agent of the Internal Revenue Service and was acting in his official capacity.

The third element to be proved beyond a reasonable doubt is that the money was paid corruptly, that is,

the defendant paid the money to Agent Ostrow with the specific intent to influence Agent Ostrow's audit of the income tax returns of Sutton & Sutton, Limited.

For you to find the defendant guilty of the crime of bribery, it is not necessary for you to find that Agent Ostrow was in fact influenced. All that is required is that it was the intention of the defendant in paying the money to influence the agent. The defendant can properly be found guilty of the crime of bribery regardless of what Agent Ostrow was thinking or planning, and it is not necessary that the bribe be successful.

Next, we come to the gratuity count in the indictment. This is the third count.

The third count charges the defendant with a violation of Section 201(f) of Title 18 of the United States Code. This section makes it a crime for any person, [438] otherwise than as provided by law, for the proper discharge of official duties directly or indirectly to give or offer anything of value to any public official for or because of any official act performed or to be performed by such public official.

In order for you to return a verdict on this count against the defendant, you must be convinced that each of the following four elements has been proved beyond a reasonable doubt:

First, that on or about September 22, 1970 the defendant wilfully and knowingly gave $1,250 to Ostrow.

Second, at the time Ostrow was an agent of the Internal Revenue Service;

Third, that the defendant gave the $1,250 for or be-

cause of official acts performed or to be performed by Ostrow: Namely, the audit of the income tax returns of Sutton & Sutton, Limited, which I have previously referred to; and

Fourth, that the $1,250 was paid otherwise than as provided by law for the proper discharge of official duties.

Now, in order to find the defendant guilty of giving an unlawful gratuity, it is not necessary that you find that the defendant paid the $1,250 with intent to [439] influence Ostrow or that there was any specific corrupt intent at all. That is a fundamental difference between the offense charged in Count 2 and the offense charged in Count 3. The essential difference between the two counts is the intent or lack thereof with which the alleged payment to Ostrow was made.

In order for the defendant to be found guilty under the bribery count, he must have paid the money corruptly, with specific intent to influence Agent Ostrow in his official acts; but under Count 3, the gratuity count, the Government is required to prove beyond a reasonable doubt only that the defendant paid the money wilfully and knowingly, that is, intentionally, as distinguished from inadvertently or negligently, and that such moneys were not required by law to be given but were given for or because of the performance of an official act.

If you find the defendant guilty on Count 2, the bribery count of the indictment, then you should acquit the defendant on Count 3. If you acquit the defendant on the bribery count, Count 2, then and only then

should you consider his guilt or innocence under Count 3, the gratuity count.

Now, the first element of this third count, to be proved beyond a reasonable doubt, is that on or about [440] September 22, 1970, the defendant wilfully and knowingly gave $1,250 to Lawrence Ostrow.

What I have said previously regarding "knowingly and wilfully" applies equally as well to this gratuity count of the indictment.

As to the second element to be proved, there is no dispute that at the time the money was given to him, Ostrow was an agent of the Internal Revenue Service.

The third element, to be proved beyond a reasonable doubt, is that the defendant gave the $1,250 for or because of official acts to be performed by Ostrow. An audit of the income tax returns of Sutton & Sutton, Limited is considered to be such an official act.

The fourth element, to be proved beyond a reasonable doubt, under the gratuity count is that the $1,250 was paid otherwise than as provided by law for the proper discharge of official duties.

I charge you that the money that the defendant paid Ostrow was not required to be paid for the performance of his duties as an Internal Revenue agent.

As to each count of the indictment, the defendant has asserted what the law terms the defense of entrapment. He claims an excuse for any participation in the criminal activities charged in the indictment. He claims that [441] these activities were instigated by Agent Ostrow, that Agent Ostrow induced him to

take part in criminal transactions when otherwise he would not have.

The word "entrapment" is a legal term. It has a technical meaning, not that of popular speech or colloquial usage. The defense of entrapment is not simply that the particular act was committed at the instance of a Government official.

Government officials in their efforts to detect crime may resort to traps, decoys and deception. This is perfectly legal. Criminal activity frequently is such that these means are necessary to catch those engaged in criminal enterprises. Thus, the fact that Government officials or employees merely afford opportunities or facilities for one who is ready and willing to violate the law when the chance presents itself does not constitute entrapment.

However, the defense of entrapment does become available when the criminal design originates with Government officials and they implant in the mind of an innocent person the disposition to commit a crime and induce its commission in order that they might prosecute. This defense is based on the policy of the law not to ensnare or entrap innocent persons into the commission of [442] a crime.

A person may not be punished for a crime he would not have committed had not officers of the law inspired, incited, persuaded or lured him to attempt it.

In short, entrapment occurs only when the defendant is a person otherwise innocent, whom the Government is seeking to punish for an offense which is the product of the creative activity of its own officials. In such

a situation, the Government may not avail itself of the fruits of those instigating activities.

Now, the defense of entrapment has two parts. You must first determine whether Agent Ostrow induced the defendant to commit the crimes charged in the indictment.

Second, if you find that Agent Ostrow did induce the defendant to commit the crimes charged in the indictment, you must then determine whether apart from such inducement the defendant was willing to commit the crimes charged and was awaiting an opportunity to act.

On the question of inducement, the defendant has to bring out some evidence that Agent Ostrow initiated the criminal activity in question. The defendant need not show that Agent Ostrow existed undue pressure on him or exerted any pressure at all. The evidence need only show that Agent Ostrow did in fact initiate the criminal [443] act, that he solicited, proposed or suggested it — in short, that he took the first step to set in motion the criminal activity charged in the indictment.

If you find that the defendant has not brought out any evidence that Agent Ostrow initiated the criminal acts charged in the indictment, then there is no defense of entrapment available to the defendant in this case.

If, however, you are satisfied that the defendant has produced such evidence of inducement, then the Government must prove beyond a reasonable doubt that such inducement was not the cause or creator of the

crime. If a person has a readiness and willingness to break the law, the mere fact that a Government agent provides a favorable opportunity is no defense. In such a case, the Government has not led an innocent person astray but has only provided the means for the defendant to realize his preexisting purpose.

Predisposition may be established in various ways. For example, it may come through evidence of preparations to commit the crime or through evidence that the defendant went along readily with the suggestion to the Government agent.

In summation, in determining whether entrapment has been established, a line must be drawn between the [444] trap for the unwary innocent and a trap for the unwary criminal.

If you believe that Agent Ostrow, either directly or indirectly, initiated the criminal activity charged in the indictment, you must acquit the defendant on all counts, unless you are convinced beyond a reasonable doubt that the defendant was ready and willing, without persuasion, and was waiting for an opportune moment to commit the offense charged. If you are so convinced, then the defendant cannot claim entrapment as an excuse for his conduct.

* * * *

AFTERNOON SESSION

2:30 p.m.

(In open court, jury present.)

(Jury roll called; all present.)

The Verdict

THE CLERK:
Madam Forelady, have you agreed upon a verdict?

THE FORELADY:
Yes, we did.

THE CLERK:
What is your verdict as to the defendant, Charles Harary, on Count 1 of the indictment?

THE FORELADY:
Not guilty.

THE CLERK:
What is your verdict on Count 2 of the indictment?

THE FORELADY:
Not guilty.

THE CLERK:
What is your verdict on Count 3?

THE FORELADY:
Guilty.

THE CLERK:
Guilty?

THE FORELADY:
Yes.

The Verdict

THE COURT:

Do you wish the jury polled, Mr. Fawer?

MR. FAWER:

Yes, I do, your Honor, please.

(Each juror, upon being asked by the clerk, "Is that your verdict?" answered in the affirmative.)

THE COURT:

Mrs. Slaton, ladies and gentlemen of the jury, you have given long and careful consideration to the charges made by this indictment. You have arrived at a verdict after careful consideration and that is the essense of the operation of our system.

You are just discharged for the day but you must return at 9:30 Monday morning.

(Jury excused.)

THE COURT:

Any motions, Mr. Fawer?

MR. FAWER:

I imagine I have ten days to make motions after the verdict, your Honor.

THE COURT:

You have. I am asking you if you want to make them now.

Motion Made After Return of Jury Verdict

MR. FAWER:

I would move that based upon my previous requests that the gratuity count be dismissed, that there was absolutely no theory on which this jury could return a verdict in view of the evidence presented to them, the theories upon which the case was submitted to the jury, that they could find any situation in which there was a lack of intent. There either was entrapment or there was not and I submit that on that basis the verdict should be set aside by the Court and verdict of acquittal directed at this time on that count.

THE COURT:

Motion is denied.

* * * *

RX 2

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 430—September Term, 1971.

(Argued January 13, 1972 Decided February 28, 1972.)

Docket No. 71-1933

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES R. HARABY,

Appellant.

Before:

MEDINA, KAUFMAN and TIMBERS,

Circuit Judges.

Appeal from a judgment of conviction for giving a gratuity, in violation of 18 U.S.C. §201(f) after a trial before Judge Metzner and a jury in the United States District Court for the Southern District of New York, on the ground that the court erred in submitting the offense of giving a gratuity, a lesser-included offense of bribery, to the jury.

Reversed and remanded with instructions to dismiss the indictment.

MICHAEL S. FAWER, New Orleans, La. (Paul Bender, New York, N. Y., of counsel), *for Defendant-Appellant.*

WALTER M. PHILLIPS, JR., Asst. U. S. Attorney, New York, N. Y. (Whitney North Seymour, Jr., U. S. Attorney for the Southern District of New York, Richard J. Davis, Asst. U. S. Attorney, New York, N. Y., of counsel), *for Appellee.*

KAUFMAN, *Circuit Judge:*

We must decide whether under certain circumstances and upon timely motion, a defendant has the right to have a lesser-included offense, although charged as a separate count in the indictment, withheld from the jury's consideration when the jury rationally cannot return a verdict of not guilty of the greater offense but guilty of the lesser offense.

Charles Harary appeals from a judgment of conviction for giving a gratuity to an Internal Revenue Agent in violation of 18 U.S.C. §201(f), after a second jury trial before Judge Metzner. Harary, who was charged in a three-count indictment with conspiracy, 18 U.S.C. §371, bribery, 18 U.S.C. §201(b)(2), and giving a gratuity, argues that the trial judge erred in submitting the gratuity count to the jury. Harary was acquitted on the bribery and conspiracy counts. For the reasons we shall set forth, we remand to the district court with instructions to dismiss the indictment.

A detailed statement of facts will aid in clarifying the difficult issue we are called upon to resolve. In early August, 1970, Harold Wenig, an Inspector with the security branch of the Internal Revenue Service, received information that two brothers, Meyer and Abraham Sutton, were so-called "payoff people." Thereupon, he arranged for Agent Lawrence Ostrow to audit the corporate tax returns for the years 1967 and 1968 of Sutton & Sutton, Ltd., an im-

porter of ready-made wearing apparel owned by the Suttons. Ostrow, who previously had conducted audits for Wenig in instances where a bribery attempt was suspected, first met with defendant Harary, the Suttons' accountant, on September 1, 1970. At this initial meeting he questioned the source of the corporation's $199,000 capitalization.[1] Harary explained that the money came from the liquidation of a family estate in Syria, but was unable to produce any substantiation at that time. Accordingly, a second meeting was scheduled for September 22.

While at lunch on September 1, Harary casually asked Ostrow if he was interested in the prostitutes they had encountered on their way to lunch. Ostrow quickly expressed his disinterest, even when Harary stated he would pay the cost. Finally, over drinks at the termination of the meeting that day, Harary offered to give Ostrow a Yashica camera valued at more than $200. Although Ostrow declined this offer too, Harary unsuccessfully persisted, stating he would be ready to sell Ostrow the camera for $15 which, he added with a chuckle, was its cost.[2]

Ostrow immediately informed Wenig of these early overtures. When Ostrow returned for the September 22 meeting with Harary to continue what Wenig termed a "normal audit," he was outfitted with a concealed tape recorder. The capitalization figure continued to be the focus of their discussion. Ostrow stated that he was not satisfied with three letters Harary had produced which recounted the liquidation of the estate of the Suttons' father when he fled

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1 No question was raised over the propriety of the capitalization figure, which could not affect the corporation's taxes. Ostrow, however, intimated that he would recommend that a tax deficiency be assessed against the Suttons personally unless they could substantiate that the $199,000 came from a nontaxable source or from taxable income properly reported.

2 Harary brought the camera from the Sutton offices in a brown paper bag. He explained that Al Sutton had taken it from one of their stores.

from Syria to Israel.[3] Instead, Ostrow demanded either a cancelled check or an affidavit to substantiate the Suttons' contention. At this point Meyer Sutton was asked to join the conference. He explained how difficult it would be to obtain the corroboration requested and pleaded with Ostrow to reconsider his demand. Ostrow said it would "put him out on a limb" if he agreed to waive his demand. The conference with Sutton ended with a warning from Ostrow that he would have to look into the Suttons' personal returns if the substantiation was not forthcoming because the large cash transactions in the businesses operated by the Suttons might furnish some light on the source of the capital.

After lunch on the 22nd, the capitalization item was discussed again. Although Ostrow repeatedly had set forth the substantiation he required, Harary pressed Ostrow with the Suttons' desire to have him conclude that the capitalization was satisfactory and suggested compensating Ostrow in return. It was then that Ostrow indicated his interest in a bribe by asking Harary: "What do you want me to do?" The two talked briefly about the capitalization and the requisite substantiation, and Harary became more explicit: "Maybe we can compensate you with some women or some money." "What do you want me to do," Ostrow repeated. When Harary proposed again that Ostrow should avoid questioning the capitalization item in his report, Ostrow responded: "Keep talking." Harary then made an initial offer of $250. Ostrow indicated that he was not satisfied with just this nibble and, by repeatedly responding "to keep talking as to anything else you want me to do," induced

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3 The first letter indicated that the writer was unable to accomplish the liquidation. The two other letters were written by one Jack Nasser, counsel to the Republic of the Philippines in Israel. He explained the difficulties and large costs of liquidating the estate in Syria which had been left when the senior Sutton was forced to flee to Israel, and indicated that he was forwarding the residue of approximately $200,000.

Harary to raise his offer to $1250 before Ostrow agreed to accept that sum. Ostrow was paid in cash that afternoon.[4]

Wenig arrested Harary one week later and brought him before two Assistant United States Attorneys for questioning. He was properly advised of his rights, initially declined to call his attorney and quickly admitted that he had paid the "bribe." Upon reconsidering, Harary decided to consult with his attorney. After conferring with counsel and in his presence, he again admitted to the Assistant United States Attorneys that he indeed had paid a "bribe" and added that he had made the initial overture. He and the Suttons, according to his statement, had decided after the September 1 meeting that Ostrow was "approachable."

The three-count indictment followed, based on payment of the $1250.[5] As we already have indicated, Harary was tried twice, the first trial having resulted in a mistrial. Both trials followed virtually the same course. The government's case consisted solely of the uncontradicted testimony of Ostrow and Wenig establishing the facts to which we have alluded. Harary relied essentially on the cross-examination of the prosecution witnesses to establish his sole defense—entrapment—although three character witnesses testified on his behalf. The summation by both the prosecution and the defense centered on the issue of entrapment. At the first trial, denying Harary's motion to withhold the gratuity count from the jury, Judge Metzner instructed the jury on all three counts as well as on the defense of entrapment. In actuality, however, the gratuity

4 Harary actually told the Suttons that Ostrow would not agree unless he was paid $2000. Harary kept $750 for himself.

5 The Suttons also were named as defendants in the indictment. At the request of the government, Harary's trial was severed. Co-defendants Meyer and Abraham Sutton went to trial on October 6, 1971. A directed verdict of acquittal was granted as to Abraham and Meyer was convicted of bribery and sentenced to imprisonment for one year.

count was considered as a lesser-included offense of bribery and not as a separate count since Judge Metzner instructed that the jury should consider the gratuity count only if it found Harary not guilty of bribery.[6] After twice returning to have the charge on entrapment read (and finally taking a copy of the charge to the jury room), the foreman announced at the end of two days of deliberations that the jurors could not reach a verdict. At the second trial, Harary continued the strategy he had employed at the first trial and repeatedly moved to strike the gratuity count,[7] but Judge Metzner denied those motions and instructed the jury on this issue as he had at the first trial. This time, however, the jury returned a verdict of not guilty on the conspiracy and bribery counts but guilty on the gratuity count.[8]

In the main, Harary argues that *Sansone* v. *United States*, 380 U.S. 343, 349-50 (1965), requires reversal of the conviction. The Supreme Court instructed in *Sansone* that a defendant does not have an absolute right to a lesser-included offense charge unless there is a "disputed factual element" which would allow the jury rationally to conclude that the defendant is guilty of the lesser offense, but not the greater offense:

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6 Both parties agree that the offense of giving a gratuity, as defined in 18 U.S.C. §201(f), is a lesser-included offense of bribery, as defined in 18 U.S.C. §201(b)(2). A lesser-included offense is commonly defined as one which is established by proof of all or less than all of the facts required to establish the greater offense. In short, it is of a kind in which one cannot commit the greater offense without committing the lesser offense. *See* 8 Moore, Federal Practice §31.03[2] and authorities cited therein.

7 Harary made the motion at the outset of the trial and renewed it at the end of the government's case and the close of the evidence. He moved for a judgment of acquittal after the verdict was returned.

8 At the second trial the jury returned once for a rereading of the entrapment charge, although it returned a second time to request Judge Metzner to repeat the charge on each count of the indictment and a third time to hear once more the charge on giving a gratuity.

> But a lesser-offense charge is not proper where, on the evidence presented, the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses. . . . In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. (Citations omitted.)

See also Berra v. *United States*, 351 U.S. 131 (1956); *Sparf* v. *United States*, 156 U.S. 51 (1895). Harary urges that this principle binds the government as well as the defendant, and that it is of no significance that the lesser-included offense is charged as a separate count of the indictment.

I.

The threshold question, therefore, is whether the evidence adduced at trial presented the *disputed* factual element which *Sansone* decided would require a lesser-offense instruction. Bribery is defined by 18 U.S.C. §201(b)(2) to include giving a public official anything of value *with the intent to influence him* to commit a fraud on the United States.[9] The lesser offense, giving a gratuity, is defined in

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9 18 U.S.C. §201(b)(2) provides:

> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other persons or entity, with intent—
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> • • •
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> (2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or

§201(f) to include giving a public official anything of value "for or because of any official act performed or to be performed" by him.[10] The only element which distinguishes bribery from giving a gratuity is *the specific intent to influence* which is required for conviction of bribery. *See United States* v. *Umans*, 368 F.2d 725, 728-30 (2d Cir. 1966), *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967). Based upon a careful examination of the record, it is clear to us that this issue was not disputed in this case.

Putting aside for the moment the defense of entrapment, we observe that the element of specific intent was not contested by the appellant and was established perforce by Harary's extrajudicial admissions to which Wenig testified. Although it is true that when Harary admitted he paid a "bribe," he did not have the language of the statute in his hand, Harary's counsel was present. Moreover, the following testimony by Inspector Wenig to Harary's corrupt intentions as expressed by Harary in his counsel's presence indicates beyond a shadow of a doubt that he had intended to influence Ostrow and believed that the payment of money was the way to achieve it:

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collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States;

* * *

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

10 18 U.S.C. §201(f) provides:

(f) Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . .

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

"A. He [the Assistant United States Attorney] first asked Mr. Harary did he pay a $1,250 bribe to Revenue Agent Lawrence Ostrow and Mr. Harary said 'Yes' and then Mr. Harary was asked who was instrumental in pushing this bribe and Mr. Harary stated that the Sutton Brothers were behind it and they had asked Mr. Harary, that is, the Sutton Brothers had asked Mr. Harary to close the deal and then he was asked why was the bribe paid and Mr. Harary stated that he was giving the Sutton Brothers a blow-by-blow description of what the Revenue Agent was doing during the examination and when the Revenue Agent told Mr. Harary that there could be a possible tax assessment of $60,000, he had communicated this fact to the Suttons and Mr. Harary said, since people don't like trouble and if the agent looks long enough he is going to find something wrong, they had decided to pay him.

And Mr. Harary then stated that he and the Suttons felt that after the initial meeting with Revenue Agent Ostrow on September first that the agent was approachable and that was the reason that they had tried this attempt.

Then Mr. Harary was asked who was the one that made the initial overture of the bribe; who was the one that first offered the bribe, and Mr. Harary stated that he was the one that offered the bribe first and not the agent. The agent didn't make any pitch for a bribe; that he was the one. Then he was asked how much money did he ask the Suttons for to pay off the Revenue Agent and Harary stated that when he had spoken to the Suttons, he had told them that the Revenue Agent had agreed to accept $2,000 and when Mr. Sutton,

> Abe Sutton, had come back from the place where he had obtained this $2,000, he had given this money to Mr. Harary and Mr. Harary was asked if he kept any of that money for himself and he said 'Yes,' that he took $750 out of that $2,000 and kept it for himself, without telling the Suttons what he was doing and without telling the Revenue Agent."

Under these circumstances, it would tax credulity to conclude that the payment of $1250 (after earlier and lower offers had been rejected), in return for Ostrow's malfeasance, was anything but outright bribery.[11] Moreover, the auction bargaining between Ostrow and Harary is totally incongruous with the concept of a gratuity.

It should be noted, contrary to the implications of the opinion of our dissenting brother, that it would not have been necessary for the jury to determine that something was "wrong" with the tax returns Ostrow was auditing before it could return a verdict of guilty on the bribery or conspiracy count. Certainly, money paid to an agent to induce him to terminate his audit is money paid with the intent to influence the performance of his official duties, even if the persons responsible for the payment are of the view that ultimately they will avoid any additional tax liability.

Furthermore, in light of Harary's admissions and his earlier offers relating to the prostitute and camera and the

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11 We find it difficult to illustrate hypothetical situations where money given during the course of an audit or other government examination will be given without the intent required for a bribery conviction. The offense of giving a gratuity was designed primarily to apply to situations where payment is not made until after official action is taken and the element of a corrupt bargain is absent or unprovable. See the Comment to §1362 of the Proposed Federal Criminal Code of the National Commission on Reform of Federal Criminal Laws.

bargaining over the amount of money to be paid Ostrow, there is no basis for our brother's fanciful hypothesis that the jury reasonably could have concluded that Harary was as pure as fresh driven snow on the bribe and that he had no desire or intention whatsoever to corruptly influence Ostrow. We are asked to accept the intriguing thought that in participating in the scheme which ended in Ostrow being paid $1250, Harary's sole purpose was to secure a $750 "fee" for himself. Our able brother does not point to any support in the record for this resourceful thesis. The record we have examined is barren indeed of any basis for such a theory. Instead, it clearly indicates that from the outset Harary's compelling and primary motive was to influence Ostrow in his official position and thus secure Ostrow's good will on behalf of his clients. Although at some point Harary decided to share the spoils, this hardly negated Harary's clear and overriding intent to bribe Ostrow. Rather, it reinforced his desire that the bribe be paid. Surely, the dissent cannot be suggesting that an accountant's ability ruefully "to put one over" on clients who seek to bribe a government official will protect the accountant from a bribery prosecution. Finally, in rejecting our dissenting brother's ingenious, but wholly unrealistic hypothesis, we rely not only on the evidence in the record, but the complete absence of the slightest suggestion by the defense at trial that it was relying on this figment to secure an acquittal. Indeed, it is not of little significance that the government has never seen fit even to suggest this argument to extricate itself from what proved to be misguided trial tactics. The dissenting opinion, which makes no mention of the first trial, seems to have rewritten the drama of the second trial to fit its own spellbinding scenario. Thus, it appears to be discussing a case which bears little resemblance to the one we are reviewing.

Intent, of course, was an issue, as it always is in a bribery case, in the sense that the judge could not have directed a verdict for the government and the jury was free to disbelieve the testimony of Ostrow and Wenig. But, as Chief Judge Friendly stated the principle in *United States* v. *Markis*, 352 F.2d 860, 867 (2d Cir. 1965), *vacated on other grounds*, 387 U.S. 425 (1967): "The mere fact that the jury was still free to disbelieve this portion of the agent's testimony [as to extrajudicial admissions neither attacked nor contradicted] does not elevate the issue to a truly 'disputed' one; in the language of the Model Penal Code §1.07(5) (1962), it does not provide 'a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.'"

Thus, if the court can conclude on the basis of the evidence presented that no reasonable man, weighing solely the evidence in light of the applicable law, could find the defendant guilty of the lesser offense and at the same time not guilty of the greater offense, no disputed factual element could be present which would compel the court to give the lesser-included offense instruction.

But, the government argues that the jury might have decided Harary did intend to influence Ostrow in his conduct of the audit, and that he was entrapped. The jury could thus find him not guilty of bribery. The difficulty with this explanation of the jury's verdict on the bribery count is that it does not afford any rational basis for the gratuity conviction. In fact, we can see no justification whatsoever for concluding on the facts presented to us that Harary could have been entrapped into giving a bribe, but not into giving a gratuity. If he was ready and willing to commit one offense, it is only logical in the circumstances before us that he would have been ready and willing to commit the other.

II.

The remaining question, specifically left open by this Court in *United States* v. *Magnus*, 365 F.2d 1007, 1010-11 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967), is whether the *Sansone* holding applies to the prosecution as well as the defense. The policies which underlie *Sansone*, the culmination of a line of decisions dating back to 1895, can lead to only one conclusion: the prosecution cannot go to the jury, over the objection of the defendant, on both the lesser and the greater offense unless an element which distinguishes the two is disputed. *See* 8 Moore, Federal Practice ¶31.03[3], at 31-20, 21 n. 35; *cf. United States ex rel. Hall* v. *Cassles*, 321 F. Supp. 673 (S.D.N.Y. 1971).

Rule 31(c) of the Federal Rules of Criminal Procedure provides that a "defendant may be found guilty of an offense necessarily included in the offense charged." This rule, which carries forward §9 of the Act of June 1, 1872, 17 Stat. 198, was designed initially to aid the prosecution when its evidence fell short of proving the offense charged in the indictment. *See United States* v. *Markis*, 352 F.2d at 866; *Kelley* v. *United States*, 370 F.2d 227, 229 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 913 (1967); 8 Moore, Federal Practice ¶31.03[1]. In appropriate cases, however, the defense may avail itself of the rule. *Stevenson* v. *United States*, 162 U.S. 313 (1896); *United States* v. *Markis*, 352 F.2d at 866.

The proper case is one where "the jury may consistently find the defendant innocent of the greater and guilty of the lesser-included offense. The jury is not given *carte blanche* to find the defendant guilty of only the lesser offense when such guilt necessarily establishes guilt of the greater offense." *Fuller* v. *United States*, 407 F.2d 1199, 1229 (D.C. Cir. 1968) (*en banc*), *cert. denied*, 393 U.S. 1120 (1969). If there is no factual dispute concerning an element which

distinguishes the offenses, to instruct on both offenses "would only invite the jury to pick between the [greater and lesser] so as to determine the punishment to be imposed, a duty Congress has traditionally left to the judge." *United States* v. *Sansone,* 380 U.S. at 350 n. 6; *see Berra* v. *United States,* 351 U.S. at 135; *Sparf* v. *United States,* 156 U.S. at 63-64. Although the jury has the power to render a verdict "in the teeth of both law and facts," *Horning* v. *District of Columbia,* 254 U.S. 135 (1920), a judge should not instruct a jury on a lesser offense over the objection of the prosecution or defense, if that instruction serves only to encourage the jury to exceed its historical function of factfinding. As the late Justice Harlan stated: "The role of the jury in a federal criminal case is to decide only the issues of fact, taking the law as given by the court. *Sparf* v. *United States,* 156 U.S. 51, 102. Certainly Rule 31(c) was never intended to change this traditional function of the jury." *Berra* v. *United States,* 351 U.S. at 134.

The rationale of *Sansone,* to which we have made reference, recognizes that the jury, although the defendant is in fact guilty of the greater offense, may take the easier course by exercising its mercy-dispensing power and return a guilty verdict on the lesser offense, thereby shirking its sworn duty. The underlying principle, however, applies equally when the prosecution seeks an instruction on the lesser offense. The jury, if it cannot agree on the basic issue of guilt, may seek the course of least resistance in the jury room and unjustly convict on the lesser offense instead of forthrightly acquitting. Those who have labored in the vineyard of litigation are aware that where the case is a hard one for the government, as this was, it will consider its task done if it can secure "the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less seri-

ous offense rather than to continue the debate . . . ." *Cichos* v. *Indiana*, 385 U.S. 76, 81 (1966) (Fortas, *J.*, dissenting). Harary's repeated motions to dismiss the gratuity count to avoid the inconsistent and compromise verdict which resulted exhibited a willingness to risk foregoing a sympathy verdict which could bring a maximum sentence of two years instead of fifteen years. His counsel's judgment was based on the fear, fully justified by the first trial, that the jury would not be able to agree on the issue of entrapment or the bribery count and thus resort to the easy way out.[12] Indeed, the jury must have encountered difficulty in agreeing on a verdict (as, in fact, the first trial illustrated), and reached common ground through a compromise. Otherwise, we cannot comprehend how, on the basis of the evidence we have already recited, it could find that the facts established the offense of giving a mere gratuity and not outright bribery.

The government, we are told, had an absolute right to have the jury charged on the gratuity offense because the indictment contained a separate gratuity count. The government, however, cannot avoid the strictures of the *Sansone* doctrine by the simple expedient of asking the grand jury to include the lesser offense as a separate count in the indictment. *See Fuller* v. *United States*, 407 F.2d at 1230.[13] A separate count serves little purpose in light of

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12 We are of the view that it will be a rare case indeed when a defendant will not want the advantage of a lesser-offense charge. For obvious reasons, the all-or-nothing risk which the defendant here was willing to take is an unusual strategy. We fully recognize, also, that compromise or inconsistent verdicts are not *per se* grounds for reversal. *Dunn* v. *United States*, 284 U.S. 390 (1932); *United States* v. *Magnus*, 365 F.2d at 1010. This hardly leads to the conclusion, however, that in the face of vigorous objection a judge should give a charge that can only serve the purpose of inducing such verdicts.

13 The *Fuller* court stated:

> In general the chargeability of lesser included offenses rests on a principle of mutuality, that if proper, a charge may be demanded

Rule 31(c), which permits the court to charge the jury on a lesser offense in appropriate cases despite the absence of a separate count in the indictment.

So that the boundaries of our holding are clear, we emphasize that we do not consider it to be reversible error to submit a lesser charge to the jury unless no "disputed factual element" which distinguishes the offenses is present and, in addition, the defendant makes a timely motion or objection at the trial. *Cf. Fuller* v. *United States*, 407 F.2d at 1230-31.

Since Harary cannot be retried on the greater offense because of his acquittal on that count, our only course is to remand to the district court with instructions to dismiss the indictment. *Green* v. *United States*, 355 U.S. 184 (1957). Although the evidence of guilt of bribery makes us reluctant to reverse the judgment of conviction on mere gratuity giving and we, too, find this saga of attempted corruption of a federal official "revolting," an appellate court can never be justified in a short-sighted preoccupation with shepherding the conviction of a defendant on a charge which has no valid basis on the evidence. We find it difficult to understand why our brother has proceeded on the totally irrelevant premise that "jurors are smarter than some people think they are," except that it indicates his view that the jury was wise in finding Harary guilty of something, even if it was the wrong thing. If this principle is valid then we see no useful purpose for judges. Our able brother's resourceful characterization of the record, while mesmer-

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by either the prosecution or defense. We see no reason why the prosecution should have an option unavailable to defendant, of being able to insist that the jury render a verdict of guilty of the greater offense, and should be able to realize on that option by the simple technique of filing an indictment in two counts rather than one. (Footnotes omitted.)

Judge Burger, now Chief Justice of the United States, concurred in both the panel and *en banc* opinions.

izing, only distracts from the difficult question of law to which he pays so little attention.

Reversed and remanded to the district court with instructions to dismiss the indictment.

MEDINA, *Circuit Judge* (dissenting):

Charles R. Harary, a Certified Public Accountant, appeals from a judgment entered upon the verdict of a jury, after a trial before Judge Metzner, convicting him of giving a gratuity to an Internal Revenue Agent in violation of 18 U.S.C., Section 201(f). The indictment charged Harary: in Count 1 with conspiracy to give a bribe; in Count 2 with giving a bribe with the specific corrupt intent to influence the Revenue Agent's audit of the income tax returns of Sutton & Sutton, Ltd., in violation of 18 U.S.C., Section 201(b); and in Count 3 with giving the Internal Revenue Agent a gratuity in violation of 18 U.S.C., Section 201(f). The jury acquitted Harary of conspiracy to bribe and of bribery but found him guilty of giving a gratuity. He was sentenced to a term of imprisonment for 1 year and is at large on bail pending the determination of this appeal.

I

The sole point raised is that the trial judge erred in denying defendant's motion to withdraw the gratuity count from the consideration of the jury. As this is a lesser-included offense and, as the jury was instructed, there could have been no verdict of guilty on both the bribery and the gratuity counts, and as the evidence was sufficient to support a verdict of guilty of bribery, Harary argues that the submission of the gratuity count was error because: "the evidence could only support a verdict of guilty of bribery or an acquittal by reason of entrapment"; the submission of the gratuity count was an invitation to

bring in a compromise verdict, and "to invade that province traditionally left to the court—the imposition of punishment." If this argument prevails Harary, whose counsel admitted in his opening to the jury that Harary had paid $1250 to the Revenue Agent, will be a free man, protected by the verdict of acquittal on the conspiracy and bribery counts from further prosecution.

It is clear to me that there is no merit whatever in any of the arguments proffered on Harary's behalf. In this simple case the Government chose to allege in the indictment each of the three counts above referred to, the defendant pleaded not guilty to each count. This put in issue each and every material allegation set forth in each count. There was no occasion to sift the proofs to discover any dispute. This inquiry was pursued in *Sansone* v. *United States,* 380 U.S. 343 (1965), and *United States* v. *Markis,* 352 F.2d 860 (2 Cir. 1965) so heavily relied upon by Harary, because the indictment in each of these cases did not allege or charge the commission of the lesser offense. In each of these cases it was found that the record showed no dispute, and hence no issue. The requested charge on the lesser-included offense was accordingly denied. The lesser offense literally was not in the case. In our case the pleas of not guilty put in issue the allegations of the gratuity count as well as the others. Harary did not testify in his own defense. His proofs consisted of a few character witnesses. The vital difference between the bribery count and the gratuity count was that a verdict of guilty of bribery had to be based on a finding of a specific intent to influence an official act of the Revenue Agent, whereas no such finding was necessary to establish the payment of a gratuity. It was the sole function of the jury to find or not to find that Harary entertained the requisite specific intent alleged in the bribery

count. And there was ample proof to support the verdict of guilty on the gratuity count.

The claim that Harary conceded and then "again conceded the factual elements supporting the bribery charge" is pure nonsense. This would have meant that he conceded he paid the money with the specific intent to influence a Revenue Agent in the performance of his duty. Counsel for Harary made no such concession, nor any concession other than that he paid the $1250 to the Revenue Agent. What counsel refers to is the testimony adduced by the prosecution of questions and answers of Harary in his statement to an Assistant United States Attorney shortly after his arrest.

II

I think what has already been said is sufficient to demonstrate that the judgment should be affirmed. I shall review and discuss the evidence, however, because I am convinced that the jurors reached a proper and thoroughly sensible and rational conclusion with respect to every one of the three counts submitted to them. The instructions of the trial judge were in every respect accurate and free from confusion, ambiguity or repetition.

Sometime in August 1970 Inspector Harold Wenig, in charge of investigations of corruption on the part of Revenue Agents and taxpayers, received a tip from an informant that Sutton & Sutton, Ltd., which operated a series of retail cash discount stores, was making pay-offs to municipal employees. Consequently, he ordered the corporate tax returns sent to him at once and caused Revenue Agent Lawrence Ostrow, with whom the Inspector had worked before, to be assigned to make a "routine audit," although no such audit had been contemplated. The Inspector gave Ostrow the most explicit directions. He was free to eat and drink at the taxpayer's expense. He was, however,

under no circumstances to initiate any discussion about making gifts or paying money. But if any "overtures" were made, he was to report them at once and then play for time until arrangements could be made to get the approval of the Attorney General to wire Ostrow for sound in order to record any offer that might be made following the "overtures." When it came down to money, if any was offered, he could bargain and induce the taxpayer to increase the offer so long as he was not the first one to bring up the subject.

It is amazing how quickly the business was done. Ostrow's first conference with Harary, and one or both of the Sutton brothers, was on September 1, 1970 at the Suttons' place of business. The first of the two corporate tax returns was for an initial period of July 21 to August 31, 1967 for the purpose of establishing an accounting period. The second corporate tax return was for the period September 1, 1967 to August 31, 1968. After a few perfunctory inquiries concerning income items, expenses and inventory, Ostrow zeroed in on an item of $199,000 representing capitalization. Where did that money come from? By lunch time Ostrow and Harary were very chummy. They had lunch together. Harary offered Ostrow the services of a prostitute, free of charge, but Ostrow says he declined the offer. Nevertheless they went around to the place frequented by these prostitutes to look them over, but none was there. Harary also offered a camera, free or at a large discount. Nothing came of this.

Most of the afternoon was spent discussing the item of $199,000. The Suttons said their father had very large holdings in Syria and Lebanon, that the $199,000 item represented what they were able to salvage, at great sacrifice, through the cooperation of certain Arabs. They produced letters, the most recent of which stated "we have succeeded

in liquidating the estate and you are getting a small sum of the overall estate." But Ostrow said anyone might have written these letters. What he needed were affidavits, notarized in Syria or Lebanon. For an Arab to do this to help a Jew to get money of the country would be like committing suicide, Ostrow was told. Nothing satisfied him. The deposit slips showed the moneys came from abroad. But Ostrow had to see the cancelled checks, which were not obtainable.

So, after about 4 hours of so-called audit on September 1, 1970, Ostrow returned to Inspector Wenig with the good news that Harary had made the anticipated "overtures," meaning the offer of the services of a prostitute and the camera. Ostrow had arranged to have Harary bring him, on September 4, the individual tax returns of the two Suttons. This had to be called off so that arrangements for wiring Ostrow for sound could be completed before the meeting at which it was expected Harary would make an offer of money. A new conference for a continuance of the "audit" was set for September 22, 1970, also at the place of business of the Suttons. When the time came, the approval of the Attorney General having been obtained, Ostrow was "wired up" by placing a KEL transmitter about the size of a king-sized cigarette case on his person, so Inspector Wenig could listen to what occurred, and by placing a Miniform recorder in his briefcase to make a permanent record that could be played back. Ostrow was searched and found to have $19. Then the Inspector and Ostrow, and perhaps others, drove over to the Suttons'. It turned out later that the recording was so full of inaudibles that it was not received in evidence at the trial. It was, however, used extensively on the cross-examination of Ostrow, which consumed the greater part of the trial.

On the morning of September 22 Ostrow pulled out all the stops. He doubted whether even the cancelled checks

or affidavits by the Arabs would satisfy him. He told Harary and one of the Suttons that he had to be able to trace the flow of the funds from their source into the corporation. And he said twice that if they could not substantiate the item of $199,000 to his satisfaction, he would have to assess a tax of $60,000 against the two Suttons individually. The predictable result was that, after another lunch at the expense of the Suttons, Harary began to talk money. It was he who brought the subject up. True to his instructions, Ostrow told Harary to "keep talking." Starting at $250, Harary was soon up to $1000. At this point he told Ostrow confidentially that of the $1000, $750 would go to Ostrow and Harary would keep the other $250 himself. Finally, Ostrow was to get $1250. Harary told the Suttons that Ostrow wanted $2000. And when one of the Suttons brought $2000 in a brown paper bag, Harary gave $1250 to Ostrow and kept the other $750 for himself. It is a revolting story.

A few days later Harary was arrested. After being photographed and fingerprinted, he was taken to the office of the United States Attorney, given the Miranda warnings and interviewed. His attorney came over. Inspector Wenig and at least two Assistant United States Attorneys were there. One of them explained to Harary the advantage of cooperation. Inspector Wenig also told him that they had a good solid case against him and that "when somebody comes in and cooperates they certainly are given some sort of consideration by the court." Accordingly, after private discussion with his attorney, Harary gave the statement in question and answer form that is so strongly relied on by counsel here as a "concession" that he was guilty of bribery as alleged in Count 2 of the indictment. This is supposed to leave only the issue of entrapment for the consideration of the jury in connection with the bribery count, despite the

fact that the statute and the judge's instructions required a finding that the money was paid with a specific intent to influence Ostrow's audit of the income tax returns of Sutton & Sutton, Ltd.

Harary's statement, as testified by Wenig, was:

> [Maloney] first asked Mr. Harary did he pay a $1250 bribe to Revenue Agent Lawrence Ostrow and Mr. Harary said "Yes" and then Mr. Harary was asked who was instrumental in pushing this bribe and Mr. Harary stated that the Sutton Brothers were behind it and they had asked Mr. Harary * * * to close the deal and then he was asked why was the bribe paid and Mr. Harary stated that he was giving the Sutton Brothers a blow-by-blow description of what the Revenue Agent was doing during the examination and when the Revenue Agent told Mr. Harary that there could be a possible tax assessment of $60,000, he had communicated this fact to the Suttons and Mr. Harary said, since people don't like trouble and if the agent looks long enough he is going to find something wrong, they had decided to pay him.

There is no doubt that the proofs would have supported a verdict of guilty of conspiracy to bribe as charged in Count 1, and a verdict of guilty of bribery as charged in Count 2. They could only have done this after rejecting the defense of entrapment, and such a rejection was justified by Ostrow's testimony that in the case of the offer of the free services of a prostitute and the camera, as well as in the case of the money, it was Harary who took the initiative. But counsel tells us there was no rational basis for an acquittal on the bribery count, and a finding of guilt on the gratuity count. Jurors are smarter than some people think they are. I believe the verdicts on each of the three

counts were not only consistent with the proofs, but that they represent a very sensible and rational disposition of all the issues in the case.

Even if the jury believed that Harary made the statement attributed to him by Inspector Wenig, the statement was made in an obvious attempt to aid the Government in the prosecution of the Suttons. The jury was not obliged to believe that the Suttons told Harary or Harary told the Suttons that if the Agent looked long enough he would find something. The word "bribe" in the first question may have been thought by Harary merely to refer to the payment of the money, and not to include such a technical matter as a specific intent to cause the Agent to do an official act.

Despite the fact that the burden of the prosecutor's summation was to persuade the jury to find Harary guilty of bribery, and the burden of defense counsel's summation was to persuade the jury to acquit Harary because of entrapment, there were overtones that could scarcely have escaped the attention of the jury. Sometimes an argument by way of indirection is the most effective. Here, every word spoken by defense counsel in support of the defense of entrapment served also to convince the jury that the whole affair of the $199,000 item was pure stage play, and that Harary knew it was pure stage play to get the money. The way Ostrow acted from the first gave Harary the impression that he was looking for a hand-out. The rejection of the letters and the deposit slips, and the perfectly ridiculous statement by Ostrow that he would have to assess a tax of $60,000 against the Suttons individually unless he could be shown proof tracing the funds from their origin in Syria or Lebanon into the corporate bank account, was pure, unadulterated hokum. Harary must have known that Ostrow had no authority to assess such a tax or to impose such impossible conditions. At least this might well have been the reaction of the jury to Ostrow's fantastic proce-

dure as he tried so hard to lay the trap for Harary. And, if the jury reasoned in this fashion, it seems not too much to suppose it also concluded that there was nothing wrong in the tax returns of Sutton & Sutton, Ltd., and no point in bribing Ostrow to do anything. On this theory, there was ample basis for a finding that the prosecution had not established, to the jury's satisfaction, that the money was paid with the specific intent to influence an official act by Ostrow. On this same theory, a verdict of not guilty on the conspiracy count was also rationally justified. It must be recalled that while the word "gratuity" appears in the conspiracy count, the allegation is solely of a conspiracy to bribe with the specific intent above referred to; and this is the interpretation of the conspiracy count adopted by the trial judge in his instructions to the jury.

Another equally rational basis for the verdict of acquittal on the bribery count is that the jury may have concluded that, whatever may have been the intent of the Suttons, whose case had been severed prior to the trial, the specific purpose and intent of Harary was not to induce the Revenue Agent to do any official act but rather to get the $750 he put in his own pocket.

It was the jury's function to decide whether the Government had proved, to its satisfaction beyond a reasonable doubt, that Harary, at the time he paid the $1250, entertained the specific intent to corruptly influence Ostrow to do an official act. As the trial judge instructed the jury:

> It is obviously impossible to ascertain or prove directly what a man knew or intended. You cannot look into a person's mind and see what his intentions were or what he knew. But a careful and intelligent consideration of the facts and circumstances shown by the evidence in any given case as to a person's actions and statements enables us to infer with a reasonable degree

of certainty and accuracy what his intentions were in doing or not doing certain things and the state of his knowledge.

I find nothing in the record to indicate that the jury, at any time, concerned itself with any compromise or with the subject of the punishment to be meted out to Harary.

The jury was instructed to decided the bribery count first, and told that it could not turn to the lesser-included charge of gratuity until it had decided guilty or not guilty on the bribery count. And so, just before bringing in its verdict, the jury asked that the instructions on the subject of the gratuity count be read to it, and this was done. On the state of this record the verdict of guilty on the gratuity count was inevitable.

I think justice has been done in this case and respectfully dissent from the reversal of the judgment of conviction.

GE-1

THE DEPARTMENT OF THE TREASURY
OFFICE OF THE DIRECTOR OF PRACTICE
WASHINGTON, D.C.

Acting Director of Practice Complainant vs. Charles E. Harary Respondent	COMPLAINT No. 71-C

COMES NOW the Complainant, Leslie S. Shapiro, who in his official capacity as Acting Director of Practice, United States Treasury Department files this Complaint pursuant to 31 CFR 10.54 and 10.92 of Treasury Department Circular No. 230 (Revised December 1970), issued under authority of 31 U.S.C. 1026 and 5 U.S.C. 301, and makes the following allegations of fact and charges of misconduct against the above-named Respondent.

I.

That Respondent is a Certified Public Accountant and has practiced before the Internal Revenue Service; and that Respondent's address of record with the Acting Director of Practice is 2025 National Drive, Brooklyn, New York 11234.

II.

That Respondent is subject to disbarment or suspension from practice before the Internal Revenue Service by virtue of 31 CFR 10.52, Section 10.52 of Treasury Department Circular No. 230 (Revised December 1970), for directly or indirectly attempting to influence the official action of an employee of the Internal

Revenue Service by the offer of a special inducement in violation of 31 CFR 10.51(f), Section 10.51(f) of Treasury Department Circular No. 230 (Revised December 1970) [formerly 31 CFR 10.51(f), Section 10.51(f), of Treasury Department Circular No. 230 (Revised November 1966)], the circumstances of Respondent's offense being more particularly set forth hereinafter:

On or about the 22nd day of September, 1970, Respondent attempted to influence Internal Revenue Agent Lawrence Ostrow, an employee of the Internal Revenue Service, in an official action involving the conduct of income tax audits of Sutton and Sutton, Ltd., on the short year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967 to August 31, 1967, and on the corporate tax return of Sutton and Sutton, Ltd., for the fiscal year ended August 31, 1968, by offering Ostrow money in the amount of $1,250.00.

III.

That Respondent is subject to disbarment or suspension from practice before the Internal Revenue Service by virtue of 31 CFR 10.52, Section 10.52 of Treasury Department Circular No. 230 (Revised December 1970), for directly or indirectly agreeing to attempt to influence the official action of an employee of the Internal Revenue Service by the offer of a special inducement in violation of 31 CFR 10.51(f), Section 10.51(f) of Treasury Department Circular No. 230 (Revised December 1970) [formerly 31 CFR 10.51(f), Section 10.51(f), of Treasury Department Circular No. 230 (Revised November 1966)], the circumstances of Respondent's offense being more particularly set forth hereinafter:

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That Respondent from on or about the first day of September 1970 up to and including the 22nd day of September, 1970, agreed with Meyer Sutton and Abraham Sutton to attempt to influence Internal Revenue Agent Lawrence Ostrow, an officer or employee of the Internal Revenue Service in an official action involving the audits of the short year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967 to August 31, 1967, and the corporate tax return of Sutton and Sutton, Ltd., for the fiscal year ended August 31, 1968, to issue a no change report with respect to the above-specified returns, in return for the Respondent offering Ostrow money in the amount of $1,250.00.

IV.

That Respondent is subject to disbarment or suspension from practice before the Internal Revenue Service by virtue of 31 CFR 10.52, Section 10.52 of Treasury Department Circular No. 230 (Revised December 1970), for failing to exercise due diligence in determining the correctness of oral or written representations made by him to clients with reference to a matter administered by the Internal Revenue Service, in violation of 31 CFR 10.22(c), Section 10.22(c) of Treasury Department Circular No. 230 (Revised December 1970) [formerly 31 CFR 10.22, Section 10.22 of Treasury Department Circular No. 230 (Revised November 1966)], the circumstances of Respondent's offense being more particularly set forth hereinafter:

Between September 1, 1970 and September 22, 1970, Respondent orally represented to Meyer and Abraham Sutton, owners of his client, Sutton and Sutton, Ltd., that Internal Revenue Agent Lawrence Ostrow had agreed to accept $2,000.00 in connection with the audits of Sutton and Sutton, Ltd., for the short year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967 to August 31, 1967, and the corporate tax return of Sutton and Sutton, Ltd., for the fiscal year ended August 31, 1968, matters administered by the Internal Revenue Service, when he knew or should have known in the exercise of due diligence that Mr. Ostrow had agreed to receive $1,250.00 in connection with such audits.

WHEREFORE, the Complainant prays that Respondent be disbarred or suspended from further practice before the Internal Revenue Service, pursuant to the provisions of 31 CFR 10.50 and 10.70, Sections 10.50 and 10.70 of Treasury Department Circular No. 230 (Revised December 1970), issued under the authority of 31 U.S.C. 1026, and 5 U.S.C. 301.

Leslie S. Shapiro
Acting Director of Practice

DATED: This 24th day of November, 1972.

THE DEPARTMENT OF THE TREASURY
OFFICE OF THE DIRECTOR OF PRACTICE
WASHINGTON, D. C.

RECEIVED
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DIRECTOR OF PRACTICE

ACTING DIRECTOR OF PRACTICE,
Complainant

vs.

CHARLES R. HARARY,
Respondent

COMPLAINT NO. 72-6

ANSWER

COMES NOW Charles R. Harary through his attorney, Michael S. Fawer, Esq., and files this his Answer to the Complaint.

FIRST AFFIRMATIVE DEFENSE

Disciplinary proceedings predicated upon the allegations and charges contained in the instant Complaint are barred by virtue of the res judicata effect to be given the Judgment of Acquittal on Counts 1 and 2 of Indictment 70 CR 1104, United States District Court, Southern District of New York, and the Order dismissing Count 3 of said Indictment. A copy of said Indictment is annexed hereto as Exhibit A.

SECOND AFFIRMATIVE DEFENSE

Complainant is collaterally estopped from proceeding with the allegations and charges contained in Paragraphs II and III of the Complaint by virtue of the fact that the precise issues

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be determined pursuant to said Paragraphs were put in issue and determined in the criminal trial of Indictment 70 CR 1104, United States District Court, Southern District of New York, which trial resulted in a Judgment of Acquittal as to Counts 1 and 2 thereof and an Order dismissing Count 3 thereof.

THIRD AFFIRMATIVE DEFENSE

Respondent avers that as to each of the alleged violations of the Regulations Governing the Practice of Certified Public Accountants before the Internal Revenue Service contained in the Complaint he was entrapped into committing said violations by an Agent of the Internal Revenue Service, United States Treasury Department.

FOURTH AFFIRMATIVE DEFENSE

The allegations of fact contained in Paragraph IV of the Complaint do not constitute a violation of 31 CFR 10.22(c) and is not conduct for which Respondent may be disbarred or suspended from practice before the Internal Revenue Service.

FIFTH AFFIRMATIVE DEFENSE

31 CFR 10.22(c), which purports to set forth a standard of conduct the violation of which allegedly constitutes grounds for disbarment or suspension from practice before the Internal Revenue Service is so vague on its face and as applied that it is void under the Fifth Amendment to the United States Constitution.

SIXTH AFFIRMATIVE DEFENSE AND
ANSWER TO ALLEGATIONS OF COMPLAINT

I.

Respondent admits the allegations of Paragraph I of the Complaint.

II.

Respondent denies the allegations of fact and charges of misconduct alleged in Paragraph II of the Complaint.

III.

Respondent denies the allegations of fact and charges of misconduct alleged in Paragraph III of the Complaint.

IV.

Respondent denies the allegations of fact and charges of misconduct contained in Paragraph IV of the Complaint except he admits that on September 22, 1970, he did give Internal Revenue Agent Ostrow $1,250.00.

WHEREFORE, Respondent prays that the Complaint be dismissed in its entirety.

Respectfully submitted this 21st day of December, 1972.

MICHAEL S. FAVER
Kullman, Lang, Inman & Bee
615 Howard Avenue
Post Office Box 60118
New Orleans, Louisiana 70160
(504) 524-4162

COUNSEL FOR RESPONDENT
CHARLES R. HARARY

[illegible]-c
70-2966

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA :

- v - : INDICTMENT

CHARLES R. MARANI, : 70 Cr. 1104
MEYER SUTTON, and
ABRAHAM SUTTON, :

Defendants. :

- -x

The Grand Jury charges:

1. From on or about the 1st day of September, 1970 up to and including the 22nd day of September, 1970, in the Southern District of New York, CHARLES R. MARANI, MEYER SUTTON and ABRAHAM SUTTON, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree with each other to commit offenses against the United States, to wit, to violate Title 18, United States Code, Sections 201(b) and 201(c) and to defraud the United States in the exercise of its Governmental function of administering the tax laws.

2. It was part of the said conspiracy that the defendants unlawfully, wilfully and knowingly, would directly and indirectly, corruptly give offer and promise sums of money, gratuities, and other things of value to a public official who was an employee of the Internal Revenue Service of the United States Treasury Department with intent to influence an official act of the said public official, to wit, to [illegible]

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of the Internal Revenue Service, not to assess tax liability shown to be due and owing on the above year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967 to August 31, 1967 and the corporate tax return of Sutton and Sutton, Ltd., for the fiscal year ending August 31, 1968 by finding no change audit for the above specified periods.

OVERT ACTS

In furtherance of the said conspiracy, and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about the 1st day of September, 1970 the defendant, CHARLES R. HARARY met with an employee of the Internal Revenue Service.

2. On or about the 22nd day of September, 1970, the defendants CHARLES R. HARARY, MEYER SUTTON and ABRAHAM SUTTON met with an employee of the Internal Revenue Service.

3. On or about the 22nd day of September, 1970 the defendant, CHARLES R. HARARY, gave the sum of $1250.00 to an employee of the Internal Revenue Service.

(Title 18, United States Code, Section 371.)

SECOND COUNT

The Grand Jury further charges:

On or about the 22nd day of September, 1970, in the Southern District of New York, CHARLES R. HARARY, MEYER SUTTON and ABRAHAM SUTTON, the defendants, unlawfully, wilfully, knowingly, and corruptly did directly and indirectly give offer and promise things of value, including but not limited to money in the amount of $1250.00, to a public official who was an employee of the Internal Revenue Service of the United States Treasury Department, with intent to influence an official act to be performed by said public official, to wit, the income tax audits of Sutton and Sutton, Ltd., on the short year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967 to August 31, 1967, and the corporate tax return of Sutton and Sutton, Ltd., for the fiscal year ending August 31, 1968.

(Title 18, United States Code, Sections 201(b) and 2.)

THIRD COUNT

The Grand Jury further charges:

On or about the 22nd day of September, 1970, in the Southern District of New York, CHARLES R. HARARY, MEYER SUTTON, and ABRAHAM SUTTON, the defendants, unlawfully, wilfully and knowingly did directly and indirectly give, offer and promise things of value, [illegible] in the amount of $1250.00, [illegible] by law for the

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proper discharge of official duties, to a public official who was then and there an employee of the Internal Revenue Service of the United States Treasury Department, for or because of official acts performed and to be performed by said public official, to wit, the income tax audits of Sutton and Sutton, Ltd. on the short year corporate tax return of Sutton and Sutton, Ltd., from July 21, 1967 to August 31, 1967 and the corporate tax return of Sutton and Sutton, Ltd., for the fiscal year ending August 31, 1968.

(Title 18, United States Code Sections 201(f) and 2.)

FOREMAN

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

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UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY

DIRECTOR OF PRACTICE Complainant vs. CHARLES R. HARARY Respondent	Complaint No. 72-6 ADMINISTRATIVE LAW JUDGE Leonard J. Ralston

INITIAL DECISION

Complainant seeks disbarment of Respondent from further practice before the Internal Revenue Service (IRS).

"Practice before the Internal Revenue Service" comprehends all matters connected with presentation to IRS relating to a client's rights or liabilities under laws or regulations administered by IRS. Such presentations include the preparation and filing of documents and communication with IRS and the representation of a client at conferences, hearings and meetings. The preparation of tax returns, the appearance as a witness for a taxpayer, or the furnishing of information at the request of IRS is not considered practice before IRS. 31 CFR 10.2(a)

The Hearing in this proceeding was held before this Tribunal in New York on October 4, 1973.

KENNETH N. HOLLAND, Esquire, for Complainant.

MICHAEL S. FAUER, Esquire, for Respondent.

The Complaint (GX-1) dated November 24, 1972 (Complaint) charges under Count II thereof that Respondent, a Certified Public Accountant, attempted to influence the official action of an employee of IRS by offering a special inducement in violation of 31 CFR 10.51(f); which section states that disreputable conduct for which a certified public accountant may be disbarred includes attempting to influence, or offering or agreeing to attempt to influence, the official action of any employee of IRS by the offer of any special inducement or by the bestowing of any gift, favor or thing of value. Said count alleges that on September 22, 1970 Respondent attempted to influence IRS

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Agent Lawrence Ostrow in an official action involving the conduct of income tax audits of Sutton & Sutton, Ltd., on the corporate tax return from July 21, 1967 to August 31, 1967 and for the fiscal year ended August 31, 1968 (Sutton Audits), by offering Ostrow $1,250.00.

Count III of the Complaint charges Respondent with agreeing to attempt to influence the official action of an IRS employee by the offer of a special inducement in violation of said Section 10.51(f). Said count alleges that Respondent from September 1 to September 22, 1970, agreed with Meyer and Abraham Sutton to attempt to influence Agent Ostrow in an official action involving the Sutton Audits, to issue a no change report with respect to the returns involved, in return for Respondent offering Agent Ostrow $1,250.00.

Count IV of the Complaint charges Respondent with failing to exercise due diligence in determining the correctness of representations made by Respondent to clients with reference to a matter administered by IRS, in violation of 31 CFR 10.22(c); which section states that each certified public accountant shall exercise due diligence in determining the correctness of representations made by him to clients with reference to any matter administered by IRS. Said Count alleges that between September 1 and September 22, 1970 Respondent represented to Meyer and Abraham Sutton, owners of his client Sutton & Sutton, Ltd., that Agent Ostrow had agreed to accept $2,000.00 in connection with the Sutton Audits, matters administered by IRS, when he knew that Ostrow had agreed to receive $1,250.00 in connection with such audits.

By Answer (GX-2) dated December 21, 1972 (Answer) Respondent denies the charges and allegations in Counts II and III of the Complaint, as well as the charges and allegations in Count IV except he admits that on September 22, 1970 he gave Agent Ostrow $1,250.00. As affirmative defenses the Answer asserts that: these proceedings under the Complaint are barred by virtue of the res judicata effect to be given the Judgment of Acquittal on Counts 1 and 2 of Indictment 70 CR 1104, United States District Court, Southern District of New York, and the Order dismissing Count 3 of said Indictment; Complainant is collaterally estopped from proceeding with the charges and allegations contained in Counts II and III of the Complaint because the precise issues were determined in the criminal trial of Indictment 70 CR 1104, which resulted

in a Judgment of Acquittal as to Counts 1 and 2 of the Indictment and an Order dismissing Count 3 thereof; as to each of the alleged violations in the Complaint, Respondent was entrapped into committing said violations by an Agent of IRS; the factual allegations in Count IV of the Complaint do not constitute a violation of 31 CFR 10.22(c) and is not conduct for which Respondent may be disbarred from practice before IRS; and, 31 CFR 10.22(c) is so vague on its face and as applied that it is void under the Fifth Amendment to the United States Constitution.

On September 28, 1973, this Tribunal denied a September 14 pretrial Motion of Respondent to dismiss the Complaint on the grounds: of collateral estoppel as to Counts II and III of the Complaint because of 70 Cr. 1104; the acquittal in 70 Cr. 1104 was based on entrapment by IRS and this IRS disciplinary proceeding is harassment; and, 31 CFR 10.22(c) has not been violated and is vague.

On January 9, 1974 this Tribunal denied Respondent's December 18, 1973 Motion to reopen the Hearing record to receive an exhibit.

GX-3 is a copy of the trial transcript in United States of America v. Charles R. Harary, Defendant, 70 Crim. 1104, United States District Court, Southern District of New York, a criminal proceeding. Said exhibit was received in this administrative proceeding upon the condition that Counsel for each party hereto would identify specifically in post-hearing briefs, the portions of such exhibit which each adopts and presents in these proceedings in proof or support of their respective allegations, charges, defenses, contentions and positions herein. (Hearing Transcript: 9-27; 53) Mr. Fawer submitted his post-hearing brief dated December 28, 1973, and Mr. Holland's post-hearing brief is dated December 31, 1973. Both parties filed Reply Briefs.

F I N D I N G S

The following numbered findings are hereby made.

1. IRS initiated the Sutton Audits because IRS had information from a confidential reliable source that said taxpayers were possible "pay-off" people. IRS Agent Ostrow arranged with Mike Sutton of Sutton & Sutton, Ltd., and Respondent (the taxpayer's accountant) to

meet with them on September 1, 1970. (GX 3-17 to 22; 57, 58; 309, 310; 314; Hearing Record 28 to 48)

2. On September 1, 1970 Ostrow met Respondent at the Sutton offices and began the audit. During some general preliminary conversation, Respondent told Ostrow that he knew someone in the camera line and might be able to get Ostrow a camera. During the audit Ostrow asked Respondent to substantiate the source of $199,000 shown on the corporate taxpayer's records as invested capital, to determine whether this item came from non-taxable sources. (GX 3-20 to 24; 31, 32; 75; 79 to 81; 87; 95 and 123)

3. On September 1, 1970 Ostrow and Respondent interrupted the audit for lunch, during which Respondent offered to provide Ostrow with the services of a prostitute and payment for the same. Ostrow refused this offer. Such offer was purely Respondent's idea. (GX 3-24, 25; 86, 87; 297)

4. On September 1, 1970 as Ostrow was about to leave the audit, Respondent invited Ostrow to have a drink with him at a bar, during which Respondent offered Ostrow a Yaschica camera worth more than $200.00 which Ostrow refused. Respondent then offered to sell the camera to Ostrow for $15.00. (GX 3-26, 27)

5. On September 22, 1970 Respondent and Ostrow continued the Sutton Audits. Ostrow again called for substantiation of the capitalization item. Respondent suggested compensation to Ostrow with women or money, for which Ostrow would accept disputed items and report that the capitalization was good. After Ostrow refused several bribe amounts and reminded Respondent that $60,000.00 in taxes was involved, Respondent increased his offer to $1,250.00 which Ostrow accepted. Respondent thereupon left the room and on his return told Ostrow Al Sutton would get the money. Respondent was the one who first offered the bribe; not Ostrow. While waiting for Al Sutton, Respondent decided Ostrow should file a no change report. Respondent left the room but returned shortly and gave Ostrow $1,250.00 in a paper bag. Thus, on September 22, 1970, Respondent attempted to influence IRS

Agent Lawrence Ostrow in the Sutton Audits, by offering and paying Ostrow money in the amount of $1,250. (GX 3-19 to 24; 28 to 38; 260; 274; 275; 296)

6. On September 22, 1970, Respondent orally represented to Meyer and Abraham Sutton that IRS Agent Ostrow had agreed to accept $2,000 personally in connection with the Sutton Audits, matters administered by IRS, when he knew that Agent Ostrow had agreed to so receive $1,250 in connection with such audits. Abe Sutton gave $2,000.00 to Respondent who kept $750.00 for himself without telling the Suttons or Ostrow. (GX 3-19-24, 28-38, 295-297)

7. The Sutton Brothers were behind the bribe and had asked Respondent to close the deal. The Suttons felt that after the initial meeting with Ostrow on September 1, 1970 that he was approachable. Thus, Respondent from on or about the first day of September 1970, up to and including the 22nd day of September 1970, agreed with Meyer Sutton and Abraham Sutton to attempt to influence IRS Agent Lawrence Ostrow in the Sutton Audits, to issue a no change report with respect to the returns involved, in return for Respondent's offer to Ostrow and payment of money in the amount of $2,000.00 ($1,250.00). (GX 3-19 to 24; 28 to 38; 170; 175, 176; 295 to 297)

8. In United States vs. Charles R. Harary, 70 Crim. 1104, United States District Court, Southern District of New York, a jury found Respondent not guilty on Counts 1 and 2 and guilty on Count 3 of an indictment charging Respondent as follows. Under Count 1, from September 1, 1970 to September 22, 1970 Respondent conspired and agreed with Charles and Meyer Sutton to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 201(b), 201(f) and to defraud the United States in the exercise of its governmental function of administering the tax laws, and it was part of said conspiracy that Respondent unlawfully, willfully and knowingly did corruptly give, offer and promise sums of money and other things of value to a public official who was an employee of the Internal Revenue Service with intent to influence an official act of

said public official, to wit, not to assess tax liability due on the corporate tax return of Sutton and Sutton Limited from July 21, 1967 to August 31, 1967 and the corporate return of Sutton and Sutton Limited for the fiscal year ended August 31, 1968 by finding no change audit for said periods. Overt Acts alleged were September 1 and September 22 meetings with Internal Revenue Service employees and $1,250.00 given an Internal Revenue Service employee on September 22, 1970. Under Count 2, on September 22, 1970 Respondent unlawfully, willfully, knowingly, and corruptly offered and promised things of value, including but not limited to money in the amount of $1,250.00 to an Internal Revenue Service employee, with intent to influence an official act to be performed by said public official, to wit: the tax audits of Sutton and Sutton Limited on returns from July 21, 1967 to August 31, 1967 and for the fiscal year ending August 31, 1968 (Title 18, United States Code, Sections 201(b) and (2). Under Count 3, on September 22, 1970 Respondent unlawfully, willfully and knowingly gave, offered and promised things of value, including but not limited to money in the amount of $1,250.00, otherwise than as provided by law for the proper discharge of official duties, to an Internal Revenue Service employee, for or because of official acts performed or to be performed by said Internal Revenue Service employee, to wit, the income tax audits of Sutton and Sutton Limited on corporate returns of said company from July 21, 1967 to August 31, 1967 and for the fiscal year ending August 31, 1968 (Title 18, United States Code, Sections 201(f) and (2). (RX-1)

Respondent appealed said conviction and in United States vs. Charles R. Harary, 457 Fed. 2d 471 (1972) the United States Court of Appeals, 2nd Circuit held that where the indictment separately charged bribery and the lesser-included offense of giving a gratuity to an Internal Revenue Service Agent, and on the evidence the jury could not rationally return a verdict of not guilty of bribery but guilty of the lesser offense, Respondent had the right to have the lesser-included offense withheld from the jury's consideration; and thereupon the court

reversed and remanded the case to the District Court with instructions to dismiss the indictment. The Appellate Court, in its opinion, stated that if the Court can conclude on the basis of the evidence presented that no reasonable man, weighing solely the evidence in light of the applicable law, could find the defendant guilty of the lesser offense and at the same time not guilty of the greater offense, no disputed factual element could be present which would compel the Court to give the lesser-included offense instruction. The Government argued that the jury might have decided Respondent did intend to influence Ostrow in his conduct of the audit, and that he was entrapped. Thus, the jury could find him not guilty of bribery. The Appellate Court stated, in reply to this contention, that the difficulty with such an explanation of the jury's verdict on the bribery count is that "it does not afford any rational basis for the gratuity conviction. In fact, we can see no justification whatsoever for concluding on the facts presented to us that Harary could have been entrapped into giving a bribe, but not into giving a gratuity. If he was ready and willing to commit one offense, it is only logical in the circumstances before us that he would have been ready and willing to commit the other." The Court stated further: "Although the evidence of guilt of bribery makes us reluctant to reverse the judgment of conviction on mere gratuity giving and we, too, find this saga of attempted corruption of a Federal official 'revolting,' an Appellate Court can never be justified in a short-sighted preoccupation with shepherding the conviction of a defendant on a charge which has no valid basis on the evidence."

DISCUSSION AND CONCLUSIONS

This action is conducted pursuant to regulations contained in 31 CFR Subtitle A, Part 10, which govern the practice of Certified Public Accountants before IRS. Said regulations maintain good order in the administration of the Internal Revenue Service and protect the integrity and welfare of the IRS and those dealing and having matters with IRS. These proceedings enforce such regulations and remedy any violation thereof.

Respondent denies Counts II, III and IV (except the $1,250.00 payment) of the Complaint and asserts collateral estoppel and entrapment as defenses. Respondent points to his acquittal under Counts 1 and 2 of the Criminal Indictment as a determination of entrapment and bar to any enforcement under Counts II and III of the Complaint.

The jury's general verdict acquitting Respondent of criminal conspiracy and bribery but convicting him of giving a gratuity, resulting from identical evidence with a plea of entrapment, fails to provide or indicate rational bases or justification for an acquittal for bribery but conviction for the gratuity. How was entrapment involved in the verdict - if determined or employed at all? Rather than an evident determination and application of a defense of entrapment, the verdict emerges as an apparent compromise of some sort without assurance or indication what if anything it purports to find beyond a criminal, punishable payment of money. This is all mere conjecture as to the real bases and verdict intended. Thus, even assuming arguendo the applicability of the principles governing res judicata or collateral estoppel and an asserted defense of entrapment, certainly the jury verdict in Respondent's criminal proceedings and dismissal of the indictment, cannot be accepted as a determination that Respondent did not violate or was entrapped into violating the administrative regulations as charged in Counts II and III of the Complaint.

Entrapment was not present here. Clearly, the findings in this case justify and require and it is so concluded that Respondent violated the regulations as charged in the Complaint without any semblance of entrapment by anyone. From the beginning of the audits, Respondent initiated every effort to make some kind of benefit available to the IRS Agent, in order to insure and guard against any adverse problem that might arise during the audits; and Respondent never abandoned such intention. From the beginning, Respondent, with the agreement and assistance of the Suttons and without provocation from IRS, subtly sought opportunities to bribe the IRS Agent.

Respondent contends that 10.22(c) of the regulations is vague and has not been violated. An obvious purpose of this subsection is to require and

insure that a representative is prudent and truthful in his dealings with his client. Giving incorrect information to his clients ($2,000.00 and pocketing $750.00) was deliberate. In determining compliance by a representative thereunder, the regulation is not perforce limited to negligent, incorrect legitimate information, but, a fortiori, includes deliberate, illegitimate misinformation. A dishonest representative can hurt everyone. Truthfulness is an implicit qualification for every representative practicing before IRS.

Thus, Respondent and his client agreed and attempted to bribe in violation of the regulations and Respondent deliberately misinformed his client.

The evidence before this Tribunal clearly proves and it is thus found, concluded and determined that Respondent willfully, without entrapment, violated the regulations as charged in the Complaint.

The excellent and exhaustive briefs filed in this proceeding by the Attorney for Complainant, thoroughly answer and refute with cited authority, the defenses and contentions of Respondent, and the contents of said briefs are hereby adopted and incorporated herein by reference as a part hereof in further support of this Decision and Order.

ORDER

Based upon the foregoing, Respondent is disbarred from further practice before the Internal Revenue Service.

Leonard J. Calhoun
ALJ

February 20, 1974

THE GENERAL COUNSEL OF THE TREASURY
WASHINGTON, D.C. 20220

RECEIVED
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DIRECTOR OF PRACTICE

Director of Practice
Complainant

vs.

Charles R. Harary
Respondent

Complaint No. 72-6

DECISION ON APPEAL

This is an appeal by Respondent Charles R. Harary, filed pursuant to §10.71 of Treasury Department Circular No. 230 (amended 7-72), 31 CFR 10.71, from a decision of the Administrative Law Judge, dated February 20, 1974, disbarring the respondent from further practice before the Internal Revenue Service. This appeal has come before me for decision under Treasury Department Order No. 175-1 (September 13, 1963) and Treasury Department Order No. 190 (Revision 9) (July 2, 1973), which authorize the General Counsel to perform the functions of the Secretary of the Treasury relating to the Office of the Director of Practice.

Respondent is a Certified Public Accountant of the State of New York and as such is authorized by 5 U.S.C. 500(c) to practice before, and has practiced before the Internal

Revenue Service. This action was commenced under 31 CFR 10.54, which authorizes the Director of Practice to institute disbarment or suspension proceedings whenever he has reason to believe that a certified public accountant has violated the laws or regulations governing practice before the Internal Revenue Service. The complaint charges that on September 22, 1970, Respondent attempted to influence the official action of an officer or employee of the Internal Revenue Service, namely, Internal Revenue Agent Lawrence Ostrow, by the offer of a special inducement in violation of 31 CFR 10.51(f) in an official action involving the conduct of income tax audits of Sutton and Sutton, Ltd., on the corporate tax return from July 21 1967 to August 31, 1967, and for the fiscal year ended August 31, 1968, by offering him the sum of $1,250.00.

The complaint also charges that Respondent agreed with Meyer Sutton and Abraham Sutton to attempt to influence Internal Revenue Agent Lawrence Ostrow in the official action described above in violation of 31 CFR 10.51(f) and, in addition, that Respondent failed to exercise due diligence in determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the Internal Revenue Service, in violation of 31 CFR 10.22(c) in that he represented to Meyer Sutton and Abraham Sutton

that Internal Revenue Agent Lawrence Ostrow had agreed to accept the sum of $2,000.00 when he knew that Mr. Ostrow had agreed to accept $1,250.00 in connection with the audits of Sutton and Sutton, Ltd.

In answer to the Complaint, Respondent denied each of the allegations, except for the fact that on September 22, 1970, he gave Agent Ostrow the sum of $1,250.00. The matters alleged in the Complaint were the subject of a criminal prosecution in the case of United States v. Charles R. Harary, 457 F.2d 471 (2d Cir. 1972), and the Respondent contends that the jury verdict and judgment on appeal in that case works a collateral estoppel, since the very same issues were determined adversely to the Government in that case and may not be further litigated in a second proceeding involving the same parties, and, further, that he was unlawfully entrapped into committing said violations by an agent of the Internal Revenue Service, United States Treasury Department; finally, Respondent contends that the allegation with respect to 31 CFR 10.22(c) is not conduct for which Respondent may be disbarred and 31 CFR 10.22(c) is so vague on its face and as applied that it is void under the due process clause of the Fifth Amendment of the United States Constitution.

The rules and regulations governing disciplinary action against attorneys, certified public accountants, enrolled

agents and other persons representing clients before the Internal Revenue Service are designed and intended to enforce the observance of professional standards of conduct, to maintain the integrity and effectiveness of proceedings before the Service, and to protect the public from those who are unworthy of the trust and confidence essential to the relationship of representative and client.

It is the general rule that the acquittal of an attorney in a prosecution for criminal acts constitutes no bar to suspension or disbarment proceedings based on the same acts and attendant circumstances for conduct involved therein. In re Echeles, 430 F. 2d 347, 352 (7th Cir. 1970). Neither can a disciplinary action by this Department be governed or limited by the outcome of a criminal proceeding involving different issues and standards of proof. A disciplinary proceeding under 31 CFR Part 10 is remedial in nature. It is not for the purpose of punishment, but rather seeks to determine the fitness of the respondent to continue to discharge his professional obligations. Cf. Ex parte Wall, 107 U.S. 265 (1883).

Respondent was convicted in the United States District Court for the Southern District of New York of giving a gratuity to Internal Revenue Agent Lawrence Ostrow in violation of 18 U.S.C. §201(f). He had been charged in a three-

count indictment with conspiracy under 18 U.S.C. §371, bribery under 18 U.S.C. §201(b)(2), and the giving of a gratuity, and was acquitted by a jury of the bribery and conspiracy charges. The United States Court of Appeals in United States v. Harary, 457 F. 2d 471, reversed the conviction on the gratuity charge on the ground that Respondent had the right to have the lesser - included offense of giving a gratuity to an Internal Revenue Agent withheld from the jury's consideration, and thereupon, the Court ordered the indictment dismissed. The Court of Appeals did not find that Harary was entrapped by agents of the Internal Revenue Service or that the jury found entrapment with respect to Counts I and II of the indictment, but merely that the jury could not rationally conclude that Harary was guilty of the lesser offense but not the greater offense.

The defense of entrapment is based on the principle that the function of law enforcement is the prevention of crime and the apprehension of criminals, and does not include tempting otherwise innocent persons to commit an offense in order that they may prosecute. Sorrells v. United States, 287 U.S. 435 (1932). However, the defense is not available to one standing ready to commit an offense given suitable opportunity. It has no application to a

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situation where enforcement officers merely permit a violation to occur in order to obtain sufficient facts to insure conviction. Lopez v. United States, 373 U.S. 427 (1963). The agents must actually instigate or provoke the commission of the offense. The Court of Appeals found the evidence concerning Harary's attempted corruption of Agent Ostrow clearly reprehensible, but, expressing "regret," concluded that the verdict of the jury was illogical and could not be permitted to stand.

The Administrative Law Judge concluded in his review of the facts of this case that entrapment was not present. I also believe that the defense of entrapment can not be sustained under the factual circumstances of this case. It has been noted that in the criminal proceeding, the jury did not specifically conclude in its findings that entrapment was present. The Administrative Law Judge has further noted that, even assuming arguendo the applicability of the principles governing res judicata and collateral estoppel and the asserted defense of entrapment, a specific jury verdict and dismissal of the criminal indictment on that ground need not be accepted as a determination that the respondent was entrapped into violating the administrative regulations at issue in this proceeding. But we need not go to such lengths where a jury verdict was so self-contradictory that the court was obliged to set it aside as plain error. Such a finding clearly ought not be regarded

as giving rise to an estoppel that will foreclose an independent determination of the facts in a collateral administrative proceeding.

Even if it could be fairly said that entrapment was present, I believe that such defense would not have application as a legal, as opposed to an equitable, principle in a remedial case of this sort. The great weight of authority holds that disbarment proceedings are not criminal in nature. Ex parte Wall, supra; Phipps v. Wilson, 186 F. 2d 748 (7th Cir. 1951); Doe v. Rosenberry, 255 F. 2d 118 (2d Cir. 1958); In re Lavine, 126 F. Supp. 39 (S.D. Cal. 1954), rev'd In re Los Angeles County Pioneer Society, 217 F. 2d 190 (9th Cir. 1954); In re Gladstone, 28 F. Supp. 858 (S.D.N.Y. 1939); and, In re Echeles, supra. The rationale governing disbarment is not that it is a penalty for the purpose of punishment, but rather that it is intended to safeguard the professions by terminating the participation of persons unfit to practice them. Thus, there is a compelling argument that, even if entrapped into doing so, one who commits bribery has manifested himself as unfit to continue to act in a professional capacity, unless there are circumstances present which would make disbarment patently unfair. It is clear from the facts that Mr. Harary's actions were professionally irresponsible and that the Internal Revenue

Service officials' actions were not such as should, in any way, have compelled him to so act. Finally, as a related matter, it should be noted that entrapment can not be asserted with respect to Respondent's violation of section 31 CFR 10.22(c).

Respondent's contention that the allegations with respect to 31 CFR 10.22(c) is not conduct for which he may be disbarred and that the section is so vague as to be void under the due process clause must likewise be rejected.

> "Each attorney, certified public accountant, or enrolled agent shall exercise due diligence:
>
> * * * *
>
> (c) In determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the Internal Revenue Service."

The purpose of this section is to insure that a representative perceives his duty to act prudently and honestly in all matters having to do with his authority to practice before the Internal Revenue Service. The evidence shows that not only did he attempt to subvert the integrity of an Internal Revenue Service employee, in addition, he consciously deceived his client for personal gain. In so doing, Respondent was clearly guilty of dishonest and disreputable conduct. The fact that

Section 10.51 makes no specific reference to conduct of this type cannot avail Respondent, since Section 10.51 states that disreputable conduct for which a representative may be disciplined is not limited to the examples given. Substantive due process simply requires that a statute or regulation, the violation of which will subject an individual to a substantial penalty, must be sufficiently clear that he can conform his conduct with what is expected of him. It should be obvious to anyone that a representative may not willfully deceive his client as to a material matter.

Attempting to corruptly influence an Internal Revenue Service employee is an extremely serious matter. Such an offense strikes at the very heart of the impartial administration of the tax laws. Such conduct must not be treated as a matter of little or no consequence. Consequently, Respondent's contention that disbarment is too harsh a remedy, and that a brief suspension would be adequate punishment for his one misstep, must be rejected out of hand.

For the foregoing reasons and following a complete review of the entire record in this matter, each of the contentions of the Respondent is rejected and, accordingly, the decision of the Administrative Law Judge to disbar the Respondent from further practice before the Internal Revenue Service is affirmed.

Date: JUN 14 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES R. HARARY, *
Plaintiff
*
VERSUS CIVIL ACTION NO. 74 Civ 372
*
WILLIAM E. SIMON, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, *
Defendant *

COMPLAINT FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION, FOR DECLARATORY JUDGMENT AND FOR AN INJUNCTION

COMES NOW Charles R. Harary, through his undersigned counsel, and alleges for his complaint as follows:

I.

The Court has jurisdiction of this action under the Administrative Procedure Act, 5 U.S.C. Section 703, et seq.

II.

Plaintiff resides in the City of New York, State of New York, and is a citizen of the United States.

III.

Defendant is Secretary of the Treasury of the United States and, as such, is head of the United States Treasury Department of which the Internal Revenue Service is a constituent part.

IV.

Plaintiff is a Certified Public Accountant licensed by the State of New York, who, from 1959 to June 17, 1974, the date of the agency action complained of herein, did practice before the Internal Revenue Service pursuant to Treasury Department Circular No. 230 (Revised). A copy of said Circular is annexed hereto as Exhibit "A".

V.

On December 23, 1970, plaintiff was charged in a 3-count indictment in the Southern District of New York with (1) conspiring to bribe a special agent of the Internal Revenue Service in violation of 18 U. S. C. 371, (2) bribing said agent in violation of 18 U. S. C. 201(b), and (3) paying said agent a gratuity in violation of 18 U. S. C. 201(f). A copy of said indictment is annexed as Exhibit "B" hereto.

VI.

On June 4, 1971, after a trial before United States District Judge Charles Metzner and a jury, at which the sole defense was that of entrapment, plaintiff was acquitted of the conspiracy and bribery charges and found guilty of the gratuity charge. The judgment of conviction was entered on August 17, 1971.

VII.

On February 28, 1972, the United States Court of Appeals for the Second Circuit reversed the conviction and ordered the indictment dismissed on the ground that the lesser included offense, i. e., the gratuity count, should not have been submitted to the jury over Defendant Harary's objections. A copy of the decision reported at 457 F. 2d 471 (2nd Cir. 1972) is annexed hereto as Exhibit "C."

VIII.

On November 24, 1972, the Director of Practice of the United States Treasury Department filed a Complaint pursuant to 31 C. F. R. 10. 54 of Treasury Department Circular No. 230 seeking to disbar Plaintiff Harary from further practice before the Internal Revenue Service predicated on the precise conduct which was the subject of the above-described criminal proceeding. A copy of the Complaint is annexed hereto as Exhibit "D."

IX.

On October 4, 1973, a hearing was held before an Administrative Law Judge at which the transcript of the testimony at the criminal trial was stipulated by the parties to be the testimony of the relevant witnesses if the same had been called to testify at the administrative hearing.

X.

On February 20, 1974, the Administrative Law Judge rendered his "Initial Decision" which denied Plaintiff Harary's motion to dismiss the Complaint and ordered him disbarred from further practice before the Internal Revenue Service for violating the Treasury Department regulations as charged in the Complaint. A copy of said decision is annexed hereto as Exhibit "E."

XI.

On March 18, 1974, plaintiff appealed said Initial Decision to the Secretary of the Treasury pursuant to Section 10.71 of Treasury Department Circular No. 230 and again sought dismissal of the Complaint on the grounds that:

A. Complainant is collaterally estopped from seeking a redetermination of the allegations and charges contained in Paragraphs II and III of the Complaint by virtue of the fact that the precise issues to be determined pursuant to said Paragraphs were put in issue and determined in the criminal trial of United States v. Harary, 70 Cr. 1104 (United States District Court, Southern District of New York), which trial resulted in a Judgment of Acquittal as to Counts 1 and 2 thereof and an Order dismissing Count 3. See United States v. Harary, 457 F. 2d 471 (2nd Cir. 1972);

B. The Judgment in said criminal trial was a verdict of acquittal by reason of entrapment perpetrated by agents of the Internal Revenue Service, United States Treasury Department. The subsequent institution of this Disciplinary Proceeding by the entrapping agency amounts to bad-faith harrassment in violation of Mr. Harary's constitutional rights and is a blatant perversion of governmental power;

C. The allegations of fact contained in Paragraph IV of the Complaint do not constitute a violation of 31 C.F.R. 10.22(c) and is not conduct for which Respondent may be disbarred or suspended from practice before the Internal Revenue Service;

D. Section 31 C.F.R. 10.22(c), which purports to set forth a standard of conduct the violation of which constitutes grounds for disbarment or suspension from practice before the Internal Revenue Service, is unconstitutionally vague under the Fifth Amendment to the United States Constitution when applied to the facts alleged in Paragraph IV.

Plaintiff sought, in the alternative, to reduce the disbarment to a suspension from practice for a reasonable period. A copy of said appeal is annexed hereto as Exhibit "F."

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XII.

On June 17, 1974, the Secretary of the Treasury affirmed the Administrative Law Judge's decision to disbar Plaintiff Harary from further practice before the Internal Revenue Service. A copy of the "Decision on Appeal" of the Secretary of the Treasury is annexed hereto as Exhibit "G." Said Decision on Appeal constitutes final agency action within the meaning of 5 U. S. C. 704, for which plaintiff has no other adequate remedy in any court except for the relief here sought.

XIII.

The Decision on Appeal upholding plaintiff's permanent disbarment from further practice before the Internal Revenue Service is arbitrary, capricious, an abuse of administrative discretion, is not in accordance with law, and is violative of Plaintiff Harary's rights under the United States Constitution and the Amendments thereto.

XIV.

From 1959 to June 17, 1974, Plaintiff Harary, as a duly licensed Certified Public Accountant, did practice before the Internal Revenue Service by representing numerous individuals before the Internal Revenue Service relating to said individuals' rights, privileges, and liabilities under the laws and regulations administered by the Internal Revenue Service. Plaintiff's ability to retain said individuals as accounting clients is and was largely dependent upon his ability to represent them before the Internal Revenue Service. Plaintiff's disbarment from practice before the I. R. S. has resulted in his inability to represent his clients before the I. R. S. with a concomitant loss of clients and income. By virtue of the loss of present clients and income and the potential loss of future clients and income plaintiff is suffering and will continue to suffer irreparable injury unless the Court grants the relief requested herein.

WHEREFORE, plaintiff prays (1) that the Court declare the action of the Secretary of the Treasury in affirming the disbarment of plaintiff Harary to be erroneous as a matter of law; (2) that the Court enter an Order dismissing the Complaint filed by the Director of Practice of the Office of the Secretary of the Treasury annexed hereto as Exhibit "D"; (3) that the Court permanently enjoin the Secretary of the Treasury from disciplining plaintiff Harary for the matters alleged in said Complaint; and (4) that the Court grant such other and further relief as it may deem just and proper.

/s/ Michael S Fawer

MICHAEL S. FAWER
1229 1st National Bank of Commerce Bldg.
New Orleans, Louisiana 70112
ATTORNEY FOR PLAINTIFF CHARLES R. HARARY

STUART G. SCHWARTZ
445 Park Avenue
New York, New York 10022
DESIGNEE FOR SERVICE OF PROCESS PURSUANT TO GENERAL RULE 4 (a).

74-4090

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES R. HARARY,

Plaintiff,

-v-

WILLIAM E. SIMON,
Secretary of the Treasury,

Defendant.

ANSWER

74 Civ. 5712 (TPG)

The defendant, William E. Simon, Secretary of the Treasury, by his attorney, Paul J. Curran, United States Attorney for the Southern District of New York, as and for his answer to the complaint herein:

1. Admits the allegations contained in paragraphs II, III, IV, VII, and X.

2. Denies the allegations contained in paragraphs I and XIII.

3. Admits the allegations contained in paragraph V except for the words "special agent" which should be "revenue agent."

4. Admits the allegations contained in paragraph VI except denies the clause "at which the sole defense was that of entrapment."

5. Admits the allegations contained in paragraph VIII except that the phrase "seeking to disbar" should be "seeking to suspend or disbar."

6. Admits the allegations contained in paragraph IX except that the phrase "relevant witnesses" should be "relevant witnesses other than William Windwear."

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7. Admits the allegations contained in paragraph XI except that the clause "for a reasonable period" in the last sentence thereof should read "of such length as the Secretary deems appropriate under all the circumstances."

8. Admits the allegations contained in paragraph XII except denies the clause "for which plaintiff has no other adequate remedy in any court except for the relief here sought."

9. Admits as much of paragraph XIV as alleges that from 1959 to June 17, 1974, plaintiff, Harary, as a duly licensed Certified Public Accountant, did practice before the Internal Revenue Service by representing individuals before the Internal Revenue Service relating to said individuals' rights, privileges, and liabilities under the laws and regulations administered by the Internal Revenue Service; further admits that plaintiff's disbarment from practice before the Internal Revenue Service has resulted in his inability to represent his clients before the Internal Revenue Service; and alleges that he is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph XIV.

WHEREFORE, the defendant prays:

(1) That plaintiff's complaint be dismissed and the relief sought therein be denied;

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(2) That the defendant be granted his costs in these proceedings and such other relief as is just and proper.

Dated: New York, New York

February 28, 1975

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Defendant.

By: _____
FREDERICK P. SCHAFFER
Assistant United States Attorney
Office and Post Office Address:
United States Courthouse
Foley Square
New York, New York 10007
Tel.: (212) 791-1989

1973

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

CHARLES R. HARARY, Plaintiff, versus WILLIAM E. SIMON, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, Defendant.	74 CIV. 5712 (TPG)

NOTICE OF MOTION

TO: Frederick P. Schaffer
Assistant United States Attorney
United States Courthouse
Foley Square
New York, New York 10007

PLEASE TAKE NOTICE that based upon the accompanying memorandum of law, all exhibits filed with the Court, and all prior proceedings herein, that Plaintiff Charles R. Harary will move this Court at the United States Courthouse, Foley Square, New York, New York, on the 9th day of April, 1976 at 9:30 a.m. or as soon thereafter as counsel may be heard, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in his favor on the grounds that there exists no genuine issue as to any material fact and that accordingly he is entitled to judgment as a matter of law as to all issues raised in the Complaint.

Michael S. Fawer

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Telephone (504) 581-7700
ATTORNEY FOR PLAINTIFF CHARLES R. HARARY

STUART G. SCHWARTZ
445 Park Avenue
New York, New York 10022
Telephone (212) 980-3200
DESIGNEE FOR SERVICE OF PROCESS PURSUANT TO GENERAL RULE 4(a).

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

CHARLES R. HARARY, Plaintiff, versus WILLIAM E. SIMON, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, Defendant.	74 CIV 5712 (TPG)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Plaintiff, Charles R. Harary, and moves pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in its favor on the grounds that there exists no genuine issue as to any material fact, and accordingly he is entitled to the judgment as a matter of law as to all issues raised in the Complaint.

WHEREFORE, Defendant respectfully urges this Court to grant his Motion for Summary Judgment in all respects.

Michael S. Fawer

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Telephone (504) 581-7700
ATTORNEY FOR PLAINTIFF CHARLES R. HARARY

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DESIGNEE FOR SERVICE OF PROCESS PURSUANT TO GENERAL RULE 4(a)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

CHARLES R. HARARY, Plaintiff, versus WILLIAM E. SIMON, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA Defendant.	74 Civ. 5712 (TPG)

STATEMENT PURSUANT TO GENERAL RULE 9(g)

Pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York and in support of the annexed Motion for Summary Judgment, Plaintiff Harary contends there is no genuine issue to be tried as to the following material facts:

1. Plaintiff is a Certified Public Accountant licensed by the State of New York, who, from 1959 to June 17, 1974, the date of the agency action complained of herein, did practice before the Internal Revenue Service pursuant to Treasury Department Circular No. 230 (Revised).

2. On December 23, 1970, plaintiff was charged in a three-count indictment in the Southern District of New York with (1) conspiracy to bribe an agent of the Internal Revenue Service in violation of 18 U.S.C. 371, (2) bribing said agent in violation of 18 U.S.C. 201 (b) and (3) paying said agent a gratuity in violation of 18 U.S.C. 201 (f).

3. On June 4, 1971, after a trial before United States District Judge Charles Metzner and a jury, plaintiff was acquitted of the conspiracy and bribery charges and found guilty of the gratuity charge.

4. On February 28, 1972, the United States Court of Appeals for the Second Circuit reversed the conviction and ordered the indictment dismissed on the ground that the lesser

included offense, i.e., the gratuity charge, should not have been submitted to the jury over Harary's objections.

5. Despite the judgment of acquittal and dismissal of the indictment, the Director of Practice of the United States Treasury Department filed a Complaint pursuant to 31 C.F.R. 10.54 of Treasury Department Circular No. 230 seeking to disbar Plaintiff Harary from further practice before the Internal Revenue Service, predicated on the precise conduct which was the subject of the above-described criminal proceeding.

6. On February 20, 1974, the Administrative Law Judge rendered his decision, which denied Plaintiff Harary's motion to dismiss the Complaint and ordered him disbarred from further practice before the Internal Revenue Service.

7. On June 17, 1974, the Secretary of the Treasury affirmed the Administrative Law Judge's decision to disbar Plaintiff Harary from further practice before the Internal Revenue Service.

Michael S. Fawer

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES R. HARARY,

Plaintiff,

-v-

WILLIAM E. SIMON,
Secretary of the Treasury of the
United States of America,

Defendant.

NOTICE OF MOTION

74 Civ. 5712 (TP

PLEASE TAKE NOTICE that upon the annexed Rule 9(g) Statement and the Memorandum of Law submitted herewith, defendant, William E. Simon, by his attorney, Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, will bring on for hearing before this Court at the United States Courthouse, Foley Square, New York, New York, in Room 128 on the 23rd day of April, 1976, at 10:00 a.m. or as soon thereafter as counsel may be heard, a motion for summary judgment in his favor pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Dated: New York, New York
April 13, 1976

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: Frederick P. Schaffer
FREDERICK P. SCHAFFER
Assistant United States Attorney
Office & P.O. Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Tel.: (212) 791-1973

FPS:sr
74-4090
n-1803

TO: MICHAEL S. FAWER, ESQ.
1220 First N.B.C. Building
New Orleans, Louisiana 70112

STUART G. SCHWARTZ, ESQ.
445 Park Avenue
New York, New York 10022

FPS:sr
74-4090
n-1803

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES R. HARARY, Plaintiff,	:	
-v-	:	RULE 9(g) STATEMENT
WILLIAM E. SIMON, Secretary of the Treasury of the United States of America, Defendant.	:	74 Civ. 5712 (TPG)

Pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York, defendant, William E. Simon, by his attorney, Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, submits the following statement of material facts as to which he contends there is no genuine issue:

1. On December 23, 1970 plaintiff was charged in a three-count indictment in 70 Cr. 1104 (S.D.N.Y.). A copy of said indictment has previously been filed with this Court as Exhibit E, and is incorporated by reference herein.

2. Plaintiff was tried before Judge Metzner and a jury, and on June 4, 1971 plaintiff was acquitted of the first and second counts of said indictment (the conspiracy and bribery charges) and convicted on the third count (the gratuity charge).

3. On February 28, 1972, the United States Court of Appeals for the Second Circuit reversed the conviction on the gratuity charge and ordered that count of the indictment dismissed. United States v. Harary,

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457 F.2d 471 (2d Cir. 1972). A copy of said decision has previously been filed with this Court as Exhibit F and is incorporated by reference herein.

4. On November 24, 1971, the Acting Director of Practice of the U.S. Department of the Treasury filed a complaint against plaintiff pursuant to 31 C.F.R. § 10.54. A copy of said complaint has previously been filed with this Court as Exhibit B and is incorporated by reference herein.

5. Thereafter, plaintiff filed an answer to said complaint, a copy of which has previously been filed with this Court as Exhibit C and is incorporated by reference herein.

6. On October 4, 1973, a hearing was held before an Administrative Law Judge. A copy of the transcript of said hearing has previously been filed with this Court as Exhibit A and is incorporated by reference herein.

7. On February 20, 1974, the Administrative Law Judge issued his initial decision, a copy of which has previously been filed with this Court as Exhibit G and is incorporated by reference herein.

8. On March 18, 1974, plaintiff appealed from said initial decision to the Secretary of the Treasury pursuant to 31 C.F.R. §10.71.

9. On June 17, 1974, the General Counsel for the Department of the Treasury issued his decision on appeal, a copy of which has previously been filed with this Court as Exhibit H and is incorporated by reference herein.

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10. Exhibits A-H, previously filed with this Court, constitute the complete administrative record of the disciplinary proceedings before the U.S. Department of the Treasury of which plaintiff seeks judicial review herein.

Dated: New York, New York
April 13, 1976

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: Frederick P. Schaffer
FREDERICK P. SCHAFFER
Assistant United States Attorney
Office & P.O. Address:
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New York, New York 10007
Tel.: (212) 791-1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

CHARLES R. HARARY,

Plaintiff,

v. 74 Civ. 5712

WILLIAM E. SIMON, SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, OPINION

Defendant.

- -X

GRIESA, J.

This is a case where both plaintiff and defendant have moved for summary judgment. I hereby grant summary judgment in defendant's favor. The following statement constitutes my findings of fact and conclusions of law.

Plaintiff is an accountant who was ordered disbarred by an Administrative Law Judge from further practice before the Internal Revenue Service. Plaintiff appealed that decision to the General Counsel for the Department of the Treasury, acting for defendant Secretary of the Treasury. The General Counsel affirmed.

I.

Before reviewing plaintiff's allegations of error below, it is necessary to review the procedural history and facts of this lengthy litigation. Prior to this administrative action, plaintiff was tried twice on a three-count indictment charging that plaintiff paid an I.R.S. agent a gratuity, conspired to bribe the agent, and did bribe the agent, United States v. Harary, S.D.N.Y., 70 Cr. 1104. The only defense was entrapment. The first trial ended on May 21, 1971, with a hung jury. The second trial was concluded on June 4, 1971 with a jury verdict of acquittal on the conspiracy and bribery counts. The jury did, however, find plaintiff guilty of giving a gratuity.

On appeal the Court of Appeals for the Second Circuit reversed the conviction on the gratuity charge and remanded the case to the District Court with instructions to dismiss the indictment. United States v. Harary, 457 F.2d 471 (2d Cir. 1972). On the facts of this case, the Court held that the jury could not rationally return a verdict of not guilty as to the offense of bribery and guilty as to the offense of paying a gratuity.

II.

On November 24, 1972 the Acting Director of Practice of the United States Department of the Treasury filed a complaint seeking to have plaintiff disbarred from further practice before the I.R.S. The complaint charged plaintiff with two violations of 31 C.F.R. § 10.52 for attempting to influence the actions of an employee of the I.R.S. by the offer of a "special inducement" and for agreeing with others to engage in such actions. The complaint also charged plaintiff with violating 31 C.F.R. §10.52 by failing to exercise due diligence in reporting to his clients with reference to a matter administered by the I.R.S. In his answer to the complaint, plaintiff denied all the charges and allegations of the complaint except he admitted giving an agent $1,250.00. Plaintiff also asserted several affirmative defenses.

At the hearing before the Administrative Law Judge on October 4, 1973, plaintiff consented to having the transcript of his second criminal trial made a part of the record. The judge also heard the

testimony of one additional witness who did not testify at trial and received various other documents.

On February 20, 1974, the Administrative Law Judge issued his decision in which he found plaintiff had violated the Treasury Department regulations as charged in the complaint and held that plaintiff should be disbarred from practicing before the I.R.S. The Administrative Law Judge considered and rejected all of the grounds plaintiff now asserts in his motion for summary judgment. In addition to affirming the Administrative Law Judge's decision in all respects, the General Counsel rejected plaintiff's plea for suspension from practice rather than disbarment.

III.

My review will be confined to the administrative record. I am denying plaintiff's offer to introduce into evidence certain materials from plaintiff's first criminal trial. Such materials were not part of the administrative record.

The following facts are clearly established.

The I.R.S. initiated an audit of the tax returns of Sutton and Sutton, Ltd., for the fiscal years 1967 and 1968. I.R.S. Agent Laurence Ostrow arranged to meet with one of the principals of the corporation. An inspector in the security branch of the I.R.S. had been informed that the Suttons were "pay-off people."

On September 1, 1970 Ostrow met with plaintiff and began the audit. During a preliminary conversation, plaintiff said he knew someone in the camera line and might be able to get Ostrow a camera. During the audit Ostrow asked plaintiff to substantiate the source of $199,000 shown as invested capital on the corporate taxpayer's records. Ostrow was seeking to determine whether this item came from non-taxable sources.

Somewhat later when Ostrow and plaintiff broke for lunch, plaintiff offered to provide and to pay for the services of a prostitute. Ostrow refused. Ostrow returned to his audit after lunch and continued to request substantiation for the $199,000 item. Plaintiff agreed to provide more

information on September 4, 1970. As Ostrow was about to leave, plaintiff invited Ostrow to have a drink with him. In a bar, plaintiff offered to give Ostrow a camera worth $200 which Ostrow refused. Plaintiff then offered to sell him the camera for $15 which offer was similarly declined.

The September 4 meeting was adjourned to September 22. On the latter date, Ostrow, who was then wired for sound, returned to the Sutton and Sutton offices. After repeated requests for additional substantiation of the $199,000 item, plaintiff suggested that "we" could compensate Ostrow with money or women if Ostrow would accept the disputed items and report that the capitalization of the firm was accurately stated. Bargaining as to the amount of the bribe ensued. Plaintiff finally made a $1,250.00 offer which Ostrow accepted. Soon thereafter, plaintiff left the room. Plaintiff told the Suttons he needed $2,000.00 for the agent. Plaintiff obtained the $2,000.00, pocketed $750.00, and gave $1,250.00 to Ostrow.

Plaintiff was arrested on September 29, 1970. After conferring with his attorney and being warned of his rights, plaintiff admitted paying a $1,250.00 bribe, but said the Sutton brothers were behind it. Plaintiff also said he, rather than Ostrow, had made the initial overture about the bribe. Plaintiff acknowledged at that time that although he told the Suttons that the agent had agreed to accept $2,000.00, he had given the agent only $1,250.00 (the sum they had agreed upon), and had kept the additional $750.00.

IV.

Plaintiff here challenges the I.R.S. disbarment on the ground that it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Plaintiff does not challenge the sufficiency of the evidence

to support the administrative factual findings. Rather, plaintiff contends that defendant Secretary of the Treasury erred as a matter of law in concluding that plaintiff violated 31 C.F.R. §§ 10.51(b) and 10.22(c), and that defendant abused his discretion in applying the remedy of disbarment rather than suspension. I find these arguments without merit.

Plaintiff cites as his first error below that defendant was collaterally estopped from seeking to discipline plaintiff because the charges of conspiring and attempting to influence an I.R.S. agent were determined in plaintiff's favor at the second criminal trial by the jury's finding that he was entrapped.

The jury, of course, did not specifically so find. Moreover, the implications of the jury's verdict are unclear. One might say that a "finding" of entrapment was necessary to the acquittal on the bribery and conspiracy counts. However, the jury convicted on the gratuity count, and in theory this would have involved a rejection of the entrapment defense. Thus the jury's verdict was confused. The

Court of Appeals was required, of course, to let stand the acquittal on the bribery and conspiracy counts. The court reversed the gratuity conviction on the ground that, under the facts of the case, the gratuity count should not have been submitted to the jury at all. The views of the Court of Appeals on the facts are worth noting, in that the Court found "this saga of attempted corruption of a federal officer 'revolting.'" 457 F.2d at 480.

In any event, an acquittal in a criminal case does not bar a civil action by the Government which is "remedial" in nature. Helvering v. Mitchell, 303 U.S. 391, 397-98 (1938). A disbarment proceeding, such as the one in the present case, falls within this rule of law. Id. at 399 and n.2; In re Echles, 430 F.2d 347, 349 (7th Cir. 1970).

Plaintiff's second contention is that the disbarment proceeding represented I.R.S. harassment and an attempt to subvert the authority of a federal court. This contention is without support. The I.R.S. had ample grounds to seek disbarment of plaintiff. The criminal acquittal in no way constituted a conclusive resolution in plaintiff's favor regarding the serious questions about plaintiff's conduct.

Plaintiff's third allegation of error is that under the facts of this case there could be no violation of 31 C.F.R. § 10.22(c). Alternatively, he asserts that if that section is applied to this case, it is unconstitutionally vague.

The regulation in question requires that each accountant practicing before the I.R.S. exercise due diligence in determining the correctness of representations made by him to clients in any matter administered by the I.R.S. The complaint below alleged that plaintiff violated this rule when he told his clients that Ostrow would accept $2,000.00 when he knew Ostrow had agreed to accept only $1,250.00.

Plaintiff argues that Section 10.22(c) prohibits only negligent misrepresentations, whereas plaintiff's misrepresentation was intentional and part of an illicit transaction. Defendant has found that Section 10.22(c) is broad enough to cover the type of conduct engaged in by plaintiff. I agree. In any event, deference is to be shown the administrative interpretation. Immigration and Naturalization Service v. Stanisic, 395 U.S. 62, 72 (1969).

There is no validity to the argument that Section 10.22(c) is unconstitutional as applied to the present situation. The regulation clearly gives notice of the need for dealing honestly with clients.

Finally, plaintiff argues that if the Court does not reverse the administrative determination, it should reduce the disbarment imposed to a suspension of practice. The sanction to be imposed in this case is a matter falling within agency discretion, and the agency decision will not be disturbed by the Court. 5 U.S.C. § 701(a)(2); Greater New York Hospital Assoc. v. United Hospital, Docket Nos. 75-6128, 76-6007 (2d Cir. May 14, 1976) slip op. 3721.

Conclusion

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted. The Clerk of the Court is directed to enter judgment dismissing the complaint.

So ordered.

Dated: New York, New York
July 28, 1976

Thomas P. Griesa

THOMAS P. GRIESA
U.S.D.J.

74 Cv 5712 GRIESA, J.

CHARLES R. HARRARY Vs. WILLIAM E. SIMON, Secretary of the Treasury of U.S.A.

DATE	PROCEEDINGS
Dec 30-74	Filed Complaint and Issued Summons.
Jan.8-75	Filed summons & Marshal's return. Served: William E. Simon, Sec. of Treas. By: Cert. Mail #162352 on 12-30-74. & Att'y Gen., Dep't of Justice " " #162351
Mar.3-75	Filed ANSWER toccomplt. USA
9-23-75	Filed defts notice of list of exhibits which are attached. (Exhibits A thru H).
03-15-76	Filed pltff's notice of motion for an order pursuant to Rule 56 (FRCP) for summary judgment. Ret 04-09-76
04-14-76	Filed deft's notice of motion for an order for summary judgment in his favor pursuant to Rule 56FRCP. Ret. 04-23-76
04-14-76	Filed deft's memorandum of law in opposition to pltff's motion for summary judgment and in support of deft's motion for summary judgment.
04-22-76	[illegible] GRIESA J.
07-28-76	Filed Opinion # 44864 - for the reasons stated, pltff's motion for summary judgment is denied. Deft's motion for summary judgment is granted. The Clerk of the Court is directed to enter judgment dismissing the complaint. So ordered- GRIESA, J. (m/n)
07-30-76	Filed judgment- that deft. have judgment against pltff. dismissing the complaint. Clerk (m/n)
09-23-76	Filed notice of appeal by pltff from judgment dtd.7-28-76. Copy mailed to U.S.Attys Office.....

CIVIL DOCKET
UNITED STATES DISTRICT

Form No. 106 Rev.

TITLE OF

ABRAHAM WINER,

Vs.

STEBAR NATIONAL CORPOR
ALDERSON LABORATORIES,
SIDNEY D. KATZMAN
DAVID BERNSTEIN,
ARTHUR SCHWARTZ,
RALPH B. LENNARD,
BERNARD CLOSE,
SAMUEL W. ALDERSON,
BENJAMIN LIPSTEIN,
ROBERT DAVIS,
IRVING WEBER-ASSOCIATES
WEBCAR AGENCY, INC., pltf
NORMAN STIVER,
NORMA SIEGEL,
ROBERT M. GOLD,
JOHN DOES I-X.

STATISTICAL RECORD

299-A

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